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## RETAIL INSTALMENT SALES: VIRGINIA REMEDIES ON DEFAULT

HARRY L. SNEAD, JR.\*

An analysis of the characteristics of an ideal system of remedies on default in retail instalment sales makes apparent the shortcomings of the present Virginia law. Such an ideal system begins with an appreciation of the security aspect of the instalment sale.<sup>1</sup> The seller should be able to keep a firm grip on his security until he has exhausted all reasonable means of satisfaction, but, his interest existing only for purposes of security, it should not provide him with an additional source of revenue. The buyer's equity should be given the most adequate protection practicable. The themes should be simplicity, reasonable certainty, low costs, and internal fairness—all designed to prevent loss of confidence in instalment buying. In no particular does the Virginia system measure up to this ideal.

### I. OVERLAPPING TYPES OF SECURITY AVAILABLE TO FINANCE PURCHASE OF GOODS

Three forms of security are available to a seller who wishes to sell and surrender possession to the buyer: conditional sale,<sup>2</sup> chattel

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<sup>1</sup>See Braucher, Sutherland and Willcox, *Commercial Transactions, Cases and Problems* 300 (1953). The Virginia court has confused substance with procedure here. Against a claim that the retention of security title under a conditional sale contract did not violate a sole and unconditional ownership clause in an insurance policy because a conditional sale was to be regarded as no more than a lien, the court replied that in Virginia a lien could be *enforced* in equity, and so Virginia, in principle, treated a conditional sale as a lien because it could also be *enforced* in equity. *Franklin Fire Ins. Co. v. Bolling*, 173 Va. 228, 234, 3 S.E.2d 182, 185 (1939).

<sup>2</sup>Va. Code Ann. § 55-88 (1950); *Universal Credit Co. v. Taylor*, 164 Va. 624, 180 S.E. 277 (1935).

mortgage,<sup>3</sup> and chattel deed of trust.<sup>4</sup> Each of these is distinctive in its form and the manner in which a default can be handled.<sup>5</sup> The conditional sale is usually employed by sellers in Virginia.<sup>6</sup> This needless duplication could be eliminated with great gain in simplicity and loss to no one.<sup>7</sup>

The seller who does not wish to surrender possession to the instalment buyer until the price is fully paid can use the "lay-away" plan. There are neither Virginia decisions nor statutes dealing with the lay-away, but its widespread availability, particularly among lower income groups, can be verified by a stroll through the shop-cluttered districts of the larger cities in Virginia. The practice governing default in lay-aways in Virginia seems to be determined by the outcome of a battle between the conscience of the individual seller and the tenacity and determination of the buyer.<sup>8</sup>

An objective observer would conclude that the whole of Virginia's legal paraphernalia used to secure purchase money sales of goods is needlessly complex and utterly fails to accomplish its purpose: the efficient moving of goods from seller to buyer with balanced regard for the interests and purposes of each. If enough controversies involving conditional sales had reached the Supreme Court of Appeals of Virginia, it is likely that the court would have evolved a more efficient

<sup>3</sup>Moore's Ex'r v. Aylett's Ex'r, 11 Va. (1 Hen. & M.) 29 (1806).

<sup>4</sup>Ambler v. D. Warwick & Co., 28 Va. (1 Leigh) 194 (1829); McClure Grocery Co., Inc. v. Watson, 148 Va. 601, 139 S.E. 288 (1927).

<sup>5</sup>See 2 CCH Cond. Sale & Chat. Mortg. Rep. (Va.) §§ 280, 290, 300, 305, 310, 315, 320, 330, 600, 630; 3 Michie's Jurisprudence, Chattel Mortgages and Conditional Sales, §§ 14, 15, 22-24 (1949).

<sup>6</sup>2 CCH Cond. Sale & Chat. Mortg. Rep. (Va.) § 101.

<sup>7</sup>Article 9 of the Uniform Commercial Code, with its unitary concept of security, points the way.

<sup>8</sup>With the former having the best of it! This writer, as counsel, once represented a lady who, by weekly payments of \$2 each, had paid \$20 on the lay-away plan toward the purchase of a \$25 Easter dress. As Easter neared she attempted to exercise the female prerogative of changing her mind and substituting another dress of equal value. The merchant's position was: (1) I do not have to, and will not, exchange the dress; (2) if she refuses to pay the balance, I am entitled to keep the dress and all the money she has paid; and (3) if the dress should be destroyed without my fault while in my possession, she would still owe the balance due. The merchant further stated that his unwillingness to exchange the dress was largely because of his belief that it was marketable only during the Easter season, and the time remaining for him to resell it was too short. This simple case illustrates the interests of both the merchant and buyer which are deserving of recognition and reconciliation. It also illustrates that, due to the small sum involved, the merchant's beliefs as to his rights become his rights in lay-aways involving small sums. Objectively, the solution reached in this case may have been just; however, as counsel, I regret that I must report that the joys of Easter were not fully appreciated by one disgruntled female wearing a dress which had lost its charm.

body of conditional sale law.<sup>9</sup> The low stakes of the individual buyer and the high jurisdictional amount<sup>10</sup> requisite to the taking of an appeal have combined to prevent the growth of case law in this area.

## II. BRIEF HISTORY OF REMEDIES ON DEFAULT

As early as 1884 a statute had been enacted which required that contracts in which a lien or title was reserved to secure the purchase price of chattels be in writing to be valid against bona-fide purchasers and lien creditors of the buyer.<sup>11</sup> In 1904 a second subdivision was added to the above statute.<sup>12</sup> Now a separate statute, it states that such contracts "may" be enforced by petition to a trial justice who "shall render such judgment thereon as may be required by the rules of law or equity applicable to such questions. The property may be sold or possession delivered or such other disposition made of it as the court or justice may direct. . . ."<sup>13</sup> In 1914, in *Mitchell Ice Co. v. Triumph Elec. Co.*,<sup>14</sup> the court interpreted this addition to the statute as not providing the sole remedy for enforcement of condi-

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<sup>9</sup>Only eleven cases directly involving the rights on default have been decided by the court between 1913 and 1958. They are: *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S.E. 104 (1913); *Levy v. Davis*, 115 Va. 814, 81 S.E. 719 (1914); *Mitchell Ice Co. v. Triumph Elec. Co.*, 116 Va. 725, 82 S.E. 730 (1914); *Southern Mfg. & Supply Co. v. Klavan*, 125 Va. 438, 99 S.E. 566 (1919); *Lynchburg Motor Co. v. Thomasson*, 141 Va. 153, 126 S.E. 64 (1925); *Universal Credit Co. v. Taylor*, 164 Va. 625, 80 S.E. 104 (1935); *Lloyd v. Federal Motor Truck Co.*, 168 Va. 72, 190 S.E. 257 (1937); *Jones v. Morris Plan Bank*, 168 Va. 284, 191 S.E. 608 (1937); *Ashworth v. Fleenor*, 178 Va. 104, 16 S.E.2d 309 (1941); *Universal Credit Co. v. Botetourt*, 180 Va. 159, 21 S.E.2d 800 (1942); *Federal Motor Truck Co. v. Kellenberger*, 193 Va. 882, 71 S.E.2d 177 (1952).

<sup>10</sup>Va. Code Ann. § 8-464 (1950) requires that the sum in controversy equal or exceed \$300 before the Supreme Court of Appeals of Virginia may take jurisdiction.

<sup>11</sup>Va. Acts, 1883-4, ch. 31 and ch. 189; this act became § 2462 of the 1887 Code, and § 5189 in the 1919 Code. Its present citation is Va. Code Ann. § 55-88 (1950). For a summary of legislative history of remedies on default to 1939, see Note, *Rights of Conditional Vendor and Vendee Upon Default in Virginia*, 26 Va. L. Rev. 232 (1939).

<sup>12</sup>Va. Acts, 1904, ch. 54; Code of Va. Ann. § 2462 (Pollard 1904).

<sup>13</sup>Va. Code Ann. § 55-91 (1950). This statute also provides for the recovery of a deficiency judgment by the seller "in a proper case." As originally enacted the statute read: "The court or justice shall hear and determine all questions arising under the contract which are properly raised by the pleadings . . . and shall render such judgment thereon as may be required by the rules of law and equity applicable to such questions." (Emphasis added.)

"The property may be sold or possession delivered or such other disposition made of it as the court or justice may direct. Whenever the judgment is for money or costs or for the specific property, execution therefor may issue as in other cases . . . ." Code of Va. Ann. (Pollard 1904) § 2462, Subdivision 2. By 1919 the statute had been amended to read as it appears above.

<sup>14</sup>116 Va. 725, 82 S.E. 730 (1914).



tional sales contracts. This decision left traditional common law and equitable remedies available. While it would be unreasonable to label this decision as erroneous, it is unfortunate that the court was not blessed with sufficient clairvoyance to see that a different holding might have resulted in the autonomous growth of a flexible and efficient body of law on the trial court level.<sup>15</sup>

Be that as it may, in the 1919 revision of the Code, the revisors were careful to point out that the amendments made to the statutory remedy probably deprived conditional sellers of their right to use detinue as a means of enforcing their contracts.<sup>16</sup> However, today, as a practical matter, there seems no substantial doubt that the statutory remedy by petition has not cut off a conditional seller's right to use detinue, and, indeed, an argument to the contrary would likely be thought absurd because detinue has long been the judicial (in-court) remedy most frequently invoked by sellers.<sup>17</sup> Meanwhile, in 1916, the General Assembly had amended the detinue statute to provide for actions in detinue to enforce contracts to secure the payment of money;<sup>18</sup> this 1916 amendment gave the defendant (buyer) the option of paying the amount of the judgment or surrendering the property.<sup>19</sup> The option was to be exercised within a time not exceeding thirty days after judgment and after the giving of sufficient security.<sup>20</sup>

It was against this background that the Virginia law on default faced its first significant test in *Universal Credit Co. v. Taylor*,<sup>21</sup> in 1935. In *Universal Credit Co.*, the seller, in May 1933, sold defendant

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<sup>15</sup>By making the discretionary remedy the exclusive remedy the trial judges would have had opportunity and freedom to develop remedies based upon their observations and experience in the numerous and varied cases before them.

<sup>16</sup>Va. Code § 5190, revisors' note (1919).

<sup>17</sup>In 1935 the defendant (buyer) in *Universal Credit Co. v. Taylor*, 164 Va. 624, 180 S.E. 277 (1935), raised the defense that what is now § 55-91 was the exclusive remedy for enforcement of conditional sales contracts. There the buyer had taken peaceable possession and was suing for a deficiency. In that context, the court rejected the defense. The defense was also rejected in *Southern Mfg. & Supply Co. v. Klavan*, 125 Va. 438, 99 S.E. 566 (1919), and in *Levy v. Davis*, 115 Va. 814, 80 S.E. 791 (1914). The former of these two cases was an action for the purchase price, the latter an action in detinue; both cases, however, arose before the 1919 revision of the Code. Thus, to this day, there has not been a square *holding* (since the 1919 revision) that § 55-91 does not take away the seller's right to bring detinue. The remedy is used daily by Virginia sellers. The enactment of Va. Code Ann. § 55-94 definitely decided this previously open question.

<sup>18</sup>These provisions are now contained in Va. Code Ann. § 8-593 (1950).

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*

<sup>21</sup>164 Va. 624, 180 S.E. 277 (1935).

a truck priced at \$1091. Defendant paid \$395 down, leaving a balance due of \$696 payable in instalments of \$58 each. Three months later the defendant defaulted and the plaintiff, seller's assignee, made peaceable repossession. Sale followed, but whether private or public does not appear. Plaintiff then sued by action at law for a deficiency of \$468.55. A unanimous court, resting its reasoning solely on the terms of the contract between buyer and seller, allowed the plaintiff to recover the deficiency. The buyer paid at least \$863.55 (including costs) for three months use of a truck worth \$1100.

That this decision was somehow out of line with the purpose of retail instalment selling did not escape the attention of the General Assembly. In 1938 it provided that there could be no deficiency judgment after a peaceful repossession unless the seller properly advertised the goods for sale and made a public sale, or unless the seller made a "new contract" with the buyer after default.<sup>22</sup>

In the interim between *Universal Credit* and the enactment of the 1938 statute (which is now section 55-93), a case arose which has shaped the destiny of sellers' remedies for many years. That case, *Lloyd v. Federal Motor Truck Co.*,<sup>23</sup> decided in 1937, has been interpreted by the trial bench as holding that a conditional seller who uses detinue to recover possession of the goods has waived his right to recover a deficiency. The result reached in the case was correct, but the anomalous facts involved afford one more illustration of a hard case making bad law.<sup>24</sup> What has been accepted as the "rule of the case" ostensibly favors buyers; reflection should convince one that the case has been one factor tending to give rise to much of the fraudulent, semi-fraudulent, and slippery "peaceable" repossession that is resorted to by sellers. It is possible that the General Assembly's latest statute, section 55-94, enacted in 1946, was designed to give the seller who uses detinue a right to recover a deficiency judgment. However, this statute, as yet not interpreted by the court, fails to make this purpose clear and has clouded the interpretation of the prior detinue statute, section 8-593.

### III. REMEDIES ON DEFAULT

By its refusal to make the statutory remedy by petition (section 55-91) the exclusive remedy for enforcement of conditional sales contracts,<sup>25</sup> the court left intact existing common law and equitable

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<sup>22</sup>Va. Code Ann. § 55-93 (1950).

<sup>23</sup>168 Va. 72, 190 S.E. 257 (1937).

<sup>24</sup>See text at note 86 infra.

<sup>25</sup>See note 17 supra.

remedies. These, some of which are modified by statute,<sup>26</sup> together with the "statutory remedy,"<sup>27</sup> constitute the whole of the procedural offering from which a seller may make his selection. The court itself has summarized these remedies.<sup>28</sup> However, the summary has defied all published attempts by writers to reduce the whole of it to an intelligible statement.<sup>29</sup> Then too, the court's summary, made in 1937, has been rendered obsolete by the subsequent enactment of sections 55-93 and 55-94. The most successful and most recent attempt to summarize the remedies on default has been made by Professor Wilfred J. Ritz<sup>30</sup> in his report on the *Uniform Commercial Code*, prepared for the Virginia Code Commission. Using Professor Ritz's analysis as a starting point, the purpose of this portion of this article is to explore the operative effects of these remedies on the reasonable expectations and purposes of each of the parties to a conditional sale.

Professor Ritz summarizes the seller's rights on default in the following manner: Upon default the seller has the right "(a) to repossess and retain the property as his own; (b) to repossess and sell at private sale; (c) to repossess and sell at public auction; (d) to bring an action of detinue; (e) to follow the statutory remedy (petition under section 55-91); (f) to bring an action at law for the purchase price."<sup>31</sup> To the above list there might be added a suit in equity to enforce the lien.<sup>32</sup> The first three remedies listed by Professor Ritz all concern peaceable repossession; in Virginia, detinue and the statutory remedy

<sup>26</sup>Detinue has been modified by Va. Code Ann. §§ 8-593 and 55-94 (1950); the modification is so extreme that perhaps it is proper to say that these are now statutory remedies. However, such phraseology has not been adopted in this article in order to prevent confusion with the purely statutory remedy afforded by § 55-91. The remedy of peaceable repossession has been modified by Va. Code Ann. § 55-93 (1950). Replevin has been abolished in Virginia. Va. Code Ann. § 8-647 (1950).

<sup>27</sup>Va. Code Ann. § 55-91 (1950).

<sup>28</sup>Lloyd v. Federal Motor Truck Co., 168 Va. 72, 77, 190 S.E. 257 (1937).

<sup>29</sup>"A recent case in discussing the matter after setting forth the remedies in the manner enumerated only serves to confuse the matter . . ." 2 CCH Cond. Sale & Chat. Mortg. Rep. (Va.) § 290.

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<sup>31</sup>Ritz, *The Uniform Commercial Code of Virginia* 237-38 (1956); also published as Virginia Code Commission, Report on Uniform Commercial Code, H. Doc. No. 28 (1956), with same pagination.

<sup>32</sup>This remedy was employed in a rather odd fashion by a seller's assignee in *Universal Credit Co. v. Botetourt*, 180 Va. 159, 21 S.E.2d 800 (1942). Dicta in the following cases indicate that the court considers the remedy by suit in equity as an additional remedy separate and apart from the statutory remedy given by § 55-91: *Mitchell Ice Co. v. Triumph Elec. Co.*, 116 Va. 725, 726, 82 S.E. 730, 731 (1914); *Universal Credit Co. v. Taylor*, 164 Va. 624, 626, 180 S.E. 277, 278 (1935); *Lloyd v. Federal Motor Truck Co.*, 168 Va. 72, 77, 190 S.E. 257, 259 (1937). See, however, note 78 infra.

by petition are the only "in-court" methods by which a seller may recover possession from the buyer.

Each of the seller's remedies, with their operative effects, will be discussed in the order of frequency of their use.

### *A. Peaceful Repossession*

Informal inquiry of many Virginia lenders and sellers leaves little doubt that this remedy is the one which sellers and lenders favor and use most frequently. From a seller's viewpoint, it is not only inexpensive and speedy, but, in addition, has great flexibility. The seller can shape his subsequent actions according to his estimate of the buyer's ignorance of his rights and his own evaluation of the buyer's degree of submissiveness.<sup>33</sup>

How does this come about? Try a simple case, one certainly not atypical. Assume B buys a television set, total purchase price \$400; the transaction is secured by a conditional sale contract and B has paid all but \$50 of the purchase price. B loses his job and defaults. After the usual duns, the seller's repossession agent appears, talks fast, perhaps threatens, or points to a clause in the contract reading "possession after default is unlawful." B is absent from the home and his wife surrenders possession. Let us assume that the television set, at a fair sale, would bring \$200. Here are the choices of action now open to the seller: (a) he may make public sale pursuant to section 55-93, but the only advantage accruing to the seller from making public sale would be to enable him to collect a deficiency judgment;<sup>34</sup> (b) he may have B (or B's wife as B's agent?) sign a "new contract,"<sup>35</sup> which would enable the seller to make private sale and still recover any deficiency; (c) he may sell at private sale,<sup>36</sup> the only penalty accruing to him being the loss of a right to recover a deficiency judgment;<sup>37</sup> or (d) he may take the television set home, give it away, or otherwise "use it as his

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<sup>33</sup>The contract used by the seller in *Universal Credit Co. v. Taylor*, 164 Va. 624, 180 S.E. 277 (1935), contained the following language: "Upon any such default the seller...may take possession of said property...without legal process, without demand (possession after default being unlawful)..." For the effect of such "in terrorem" clauses see Mindel, *Retail Instalment Selling*, Maryland Legislative Council, Research Division, Research Report No. 6, 31-32 (1940). Clearly under existing Virginia law retention of possession by the buyer after default should not be unlawful; resisting peaceable repossession is the only way an impecunious buyer with a substantial equity in the goods can protect his equity.

<sup>34</sup>Va. Code Ann. § 55-93 (1950).

<sup>35</sup>*Ibid.*

<sup>36</sup>*Universal Credit Co. v. Taylor*, 164 Va. 624, 180 S.E. 277 (1935).

<sup>37</sup>Va. Code Ann. § 55-93 (1950).

own,"<sup>38</sup> but if he does so he runs the risk (theoretical?) of being sued for conversion by the buyer.<sup>39</sup>

The opportunities offered by each of these alternatives will now be discussed seriatim, but first it should be emphasized here that, as the law now stands, there is never any legal duty on a Virginia seller to make a public sale.

(1) *Public Sale pursuant to Section 55-93.*<sup>40</sup> This section was enacted in response to the decision in *Universal Credit Co. v. Taylor*.<sup>41</sup> It represents Virginia's attempt to protect the buyer from having to pay a deficiency judgment after private sale by the seller. By using the right to a deficiency judgment as the carrot to induce the seller to make public sale, the statute does not protect the buyer who has a substantial equity in the goods; it has the opposite effect. The greater the buyer's equity in the goods the less the need for a deficiency judgment and the less incentive for the seller to protect the buyer's equity by making public sale. More than a lack of altruism operates against the seller voluntarily choosing to make public sale, since public sales are time consuming and relatively expensive.

It may be argued that a buyer who has a substantial equity will be more inclined to resist peaceable repossession and thus force the seller to bring an action of detinue to recover possession. Such argument ignores the dunning and cunning of repossession agents and

<sup>38</sup>*Ashworth v. Fleenor*, 178 Va. 104, 16 S.E.2d 309 (1941).

<sup>39</sup>*Ibid.*

<sup>40</sup>"If the vendor of any personal property sold under a written contract whereby the title thereto or a lien thereon is reserved to secure unpaid purchase money, or the assignee or beneficial owner of any such contract shall repossess and sell such personal property without legal process, such repossession and sale shall operate to cancel and fully discharge the amount of money secured by such contract notwithstanding any provision to the contrary contained in such contract. This section shall not be construed to affect in any way the provisions of § 55-91 or the rights and remedies provided therein, nor shall it apply in any case where the property repossessed shall be sold at public auction in the county or city in which the vendor has his principal place of business, or in which the vendee resides, after 10 days written notice of the time, place and terms of sale served upon or sent by registered mail to the last known post office address of the vendee, and after publication in some newspaper having general circulation in the county or city in which such sale is to be held, or, in lieu of such publication, after notice duly posted for five days at three or more public places in such county or city.

"Nothing in this section shall affect the validity of any new contract in writing made after default on the part of the vendee, between the vendor, assignee or beneficial owner and the vendee providing for the resale of such personal property and the vendee's liability for any deficiency."

<sup>41</sup>164 Va. 624, 180 S.E. 277 (1935). This case and § 55-93 are discussed in Note, Rights of Conditional Vendor and Vendee Upon Default in Virginia, 26 Va. L. Rev. 232 (1939).

the legal nature of "peaceable" repossession. Peaceable repossession does not require the buyer's consent.<sup>42</sup> It forgets those buyers who are ignorant of their rights, those who are misled or cowed by the statements in the contract<sup>43</sup> and the statements made by the repossession agent; it ignores buyers who are "Milquetoasts." Further, this argument ignores the fact that, in practical operation, the detinue statutes, hereinafter discussed, may not afford a defaulting buyer who has a substantial equity the best practicable protection for that equity. Both the Uniform Conditional Sales Act and the *Uniform Commercial Code* seek to protect the buyer who has a substantial equity by making public sale compulsory if the buyer has paid a specified percentage of the purchase price.<sup>44</sup>

(2) *Peaceable Repossession and the Signing of the "New Contract" provided for in Section 55-93.*<sup>45</sup> At the time of repossessing the seller can, usually tries, and often does have the buyer sign what is known in the trade as a "waiver"; this waiver, based on the "new contract" clause of section 55-93, allows the seller to make a private sale and continue to hold the buyer liable for a deficiency. The new contract clause of section 55-93 obviously was designed to serve a wholesome purpose: to save the buyer and seller the expense of making public sale when it was apparent that it would benefit neither. This purpose is being perverted by the routine exaction of waivers. Although some waiver forms recite a consideration of one dollar, one wonders whether there is in fact any legal consideration for most waivers, but this legal question, like many others, will probably never be raised by the defaulting buyer who, if he could afford legal assistance, often would not have defaulted in the first place.

The *Uniform Commercial Code* is more realistic. It provides that sale can be dispensed with even though the buyer has a substantial equity, if the buyer has signed after default a statement renouncing or modifying his rights.<sup>46</sup> However, if such statement is signed in a case where public sale otherwise would be compulsory, the seller loses his right to recover a deficiency judgment and must accept the goods in full satisfaction of the balance due.<sup>47</sup>

As the law in Virginia now stands, sellers are given an opportunity

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<sup>42</sup>E.g., *Jones v. Morris Plan Bank*, 168 Va. 284, 191 S.E. 608 (1937).

<sup>43</sup>See note 33 *supra*.

<sup>44</sup>U.C.S.A. § 19; U.C.C. § 9-505(1): (This applies only to "consumer goods.")

<sup>45</sup>The statutory provision is set out in the last paragraph of note 40 *supra*.

<sup>46</sup>U.C.C. § 9-505(1).

<sup>47</sup>U.C.C. § 9-505.

to sell the repossessed goods at a low price, possibly to friends or employees, and then to present the buyer with the prospect of a large deficiency judgment, which possibly can be used by the seller as a basis for compromise.

(3) *Peaceable Repossession Followed by Private Sale.* If the seller makes peaceable repossession but does not procure a "waiver," he may make private sale, but section 55-93 provides that in doing so he forfeits any right to a deficiency judgment, any provision in the contract to the contrary notwithstanding.<sup>48</sup> His interest extending only to the balance due and costs, the temptation would be strong upon the seller to offer the goods for sale at a price which covered only those items; a quicker sale would be assured, and the seller could use such sale of the goods as a means of favoring his friends or employees. The greater the buyer's equity the more outrageous the result, and, although the buyer theoretically has an action against the seller for a truly fraudulent or "sham" sale, it is submitted that, because of long conditioning, Virginia buyers have come to believe they have no rights and are usually relieved to escape the transaction without being assessed for a deficiency. If a buyer did employ counsel to rectify a sham or quick private sale, the problems of proof and sufficiency of evidence would combine to prevent recovery except in the most flagrant instances,<sup>49</sup> and, after subtracting attorney's fees, the recovery often would not be worth the candle because of the small amount involved in the typical instalment sale. These are not the kind of cases attorneys take on a contingent fee basis.

(4) *"Using the Goods as His Own."* After peaceable repossession the seller might decide to take the goods home for his own use, give them away, or otherwise "use them as his own." What consequences are attached to such action?

*Ashworth v. Fleenor*<sup>50</sup> is the case in point. There, one Wholey bought a sawmill from Fleenor, paying \$600 down and giving a \$200 note for the balance. The transaction was secured by a conditional sale contract. To secure an advance of approximately \$3000 made to him by Ashworth, Wholey assigned his rights in the sawmill to Ashworth. Wholey failed to pay the \$200 note at maturity. After lengthy

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<sup>48</sup>Note 40 supra.

<sup>49</sup>Cf. *Perdue v. Davis*, 176 Va. 102, 10 S.E.2d 558 (1940), in which it was said that mere inadequacy of price is not sufficient to avoid a sale under a deed of trust, unless so gross as to shock the conscience of the chancellor and raise a presumption of fraud.

<sup>50</sup>178 Va. 104, 16 S.E.2d 309 (1941).

negotiations, *Ashworth* told and subsequently wrote *Fleenor* that he, *Ashworth*, would pay the note. In spite of this, *Fleenor* took peaceful possession of the sawmill, made no attempt to sell it or ascertain its market value, but used it for his own purposes. Upon learning this, *Ashworth* again wrote *Fleenor* and offered to pay the balance due plus costs; *Fleenor* ignored this offer. The conditional sale contract stipulated that in event of default, "the [seller] may declare all such indebtedness due and take possession of said property and sell the same at public or private sale . . . and apply the balance thereof on said indebtedness." The sawmill was severely damaged by fire while in *Fleenor's* possession. *Ashworth* brought suit under section 55-91,<sup>51</sup> alleging an implied obligation on the part of *Fleenor* to pay him a fair price for the machinery converted, less the \$200 due on the purchase price. The Supreme Court of Appeals of Virginia reversed the trial court's decision and remanded the case with directions to ascertain the fair market value of the sawmill at the time and place it was repossessed by *Fleenor*, and give *Ashworth* judgment for this amount less the \$200 and interest due on the purchase price. The result in this case seems clearly correct. But what are the grounds on which that result is rested?

It has been said that the case stands for the following proposition: When a conditional vendor peaceably repossesses and keeps the property as his own, he is liable to the vendee for the difference between the fair market value of the property at the time and place of repossession and the unpaid purchase money with interest.<sup>52</sup> Those who would like to believe that the instalment buyer is given some measure of practical protection in Virginia might find solace in this rule; this writer cannot, and for the following reasons: (1) standing alone as it does, it is an impractical rule because it rests on the erroneous assumption that the typical instalment buyer both knows of his rights and will have the time and temerity to inquire persistently of the seller whether the seller is "using the goods as his own" (as distinguished from making sale), and (2) the basis on which the *Ashworth* result is rested is not clear. The result of the case might be subject to change by a slight alteration in the contract.

Approaching the *Ashworth* case afresh, there are no fewer than

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<sup>51</sup>On its face the statute does not appear to provide for a suit by the buyer or buyer's assignee. Query as to whether *Ashworth's* cause of action should not have been in trover or for breach of contract?

<sup>52</sup>3 *Michie's Jurisprudence*, Chattel Mortgages and Conditional Sales, § 23; Virginia Code Commission, Report on Uniform Commercial Code, H. Doc. No. 28, p. 238 (1956).



two grounds on which the result may have been rested by the court. (1) The court indicated that Fleenor simply failed to perform his contract.<sup>53</sup> That is, the case might have been decided otherwise if the contract had expressly permitted Fleenor to repossess and use the goods as his own in absolute discharge of the indebtedness. This solution waters the assumed role of the case into a piddling thing subject to change by a few dabs of printer's ink on the contract. (2) Fleenor, the seller, converted when he repossessed *because* Ashworth had offered to discharge the indebtedness before repossession. This seems the more plausible explanation of the case. The bill alleged a conversion;<sup>54</sup> the opinion of the court makes noises like conversion; the authority cited on damages deals with conversion. (Notice that Ashworth also offered to pay after Fleenor had repossessed.) If this be the reason, or one of the reasons, for the court's decision, a significant principle of the case has been overlooked: the case is weak authority for the proposition that a defaulting buyer has a legal right to redeem before repossession, and possibly after repossession, and a failure to recognize the right gives rise to an action for conversion against the seller.

Theoretically, the rule of the case might offer buyers some protection against sellers who do not make sale, or those who make a sham sale, but taking human nature and the area of the rule's impact into account, a seller who has made peaceful repossession is given an opportunity to base his subsequent actions in respect to the goods on his evaluation of the personality and degree of ignorance of the buyer. In assuming that a cowed, ashamed defaulting buyer will inquire or take steps to ascertain whether the seller is "using the goods as his own," the rule of the *Ashworth* case is laughably tragic in its failure to deal with instalment buyers as they actually exist in this life.<sup>55</sup>

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<sup>53</sup>"[T]he evidence conclusively establishes the fact that when Fleenor repossessed the sawmill outfit, he did it with the intention of converting it to his own use and not selling it for its then market value and accounting for the proceeds *in accordance with the provisions of his contract* . . ." *Ashworth v. Fleenor*, 178 Va. 104, 111, 16 S.E.2d 309, 311 (1941). (Emphasis added.)

<sup>54</sup>Actually, the bill alleged both breach of an implied obligation and a conversion which gave rise to the breach. "By reason whereof there is an implied obligation upon the part of the said S. J. Fleenor to pay complainant a fair price for said machinery thus converted to his own use . . ." *Ashworth v. Fleenor*, 178 Va. 104, 108, 16 S.E.2d 309, 310 (1941).

<sup>55</sup>This writer is not so naive as to believe that all defaulting retail instalment buyers are shy, demure fellows. The vast majority are probably the opposite. But that is not the point. What is here being protested is a stacking of the rules of law against those who, we are told, shall some day inherit the earth.

Picture, if you can, a factory worker who has an equity of perhaps \$75 in a repossessed television set inquiring of the seller, "Are you using that set as your own?" This is what the *Ashworth* rule requires. And, since there is in Virginia no maximum time limit within which a repossessing seller must make sale of repossessed goods,<sup>56</sup> this inquiry must be continued for an indefinite period of time, or until such time had elapsed as would enable the buyer to claim that the seller was using the goods as his own.<sup>57</sup>

To this tirade the natural response of the legally trained is that our factory worker should see a lawyer. However, the average buyer's ignorance of his rights, often induced by the seller's misleading contracts or misrepresentations and by the low stakes of the individual buyer, indicates the impracticability of this most natural of suggestions. By leaving sellers free to ignore substantial equities of buyers, the moral tone of the instalment sale market has been softened; scrupulous sellers, in search of a standard of conduct, tend to base their feeling of what is right on what is allowed by law and what other sellers can "get by with." The unscrupulous seller is given the power to engage in a form of unfair competition with his brethren; he can make more profit or absorb more losses with unfair repossession and resale tactics. To meet the competition, the seller or lender who otherwise would be scrupulous is forced to emulate his competitor.

What, then, is a solution? This maze has as its most obvious exit the placing of a legal duty on the *seller or lender* to take positive steps to protect any substantial equity the buyer might have.<sup>58</sup>

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<sup>56</sup>Cf. U.C.C. § 9-505(1) requiring the seller of consumer goods to resell within ninety days after repossession if the debtor has paid 60% of the cash price. If the debtor has paid less than 60% of the cash price, apparently the sale need only be made within a commercially reasonable time after repossession. U.C.C. §§ 9-504(1), 2-706(2).

<sup>57</sup>This is intended to raise the question of *when* the "conversion" occurs in an *Ashworth v. Fleenor* situation. In *Ashworth* the court solved this question neatly by finding that Fleenor, the seller, had no intention of reselling when he repossessed. See note 53 *supra*. Absent such tailor-made facts, the buyer clearly cannot claim a conversion the moment the seller repossesses the goods; apparently the seller will be held to be "using the goods as own" only after the buyer has demanded that a sale be made and that demand has been refused or after the buyer has waited a reasonable period of time for the seller to make sale.

<sup>58</sup>See note 44 *supra*. U.C.C. § 9-505(1) gives the buyer the right to elect between suing the seller or his assignee in conversion or under § 9-507(1). Section 9-507(1) of the Code places a floor under the amount of the buyer's recovery: If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

B. *Detinue*<sup>59</sup>

Next to peaceful repossession, the action of detinue seems to be the most favored remedy of conditional sellers in Virginia. There would appear to be at least three reasons for detinue being the favorite in-court remedy. The first reason is a legitimate one. Issuance of the detinue warrant does not require the assistance of a lawyer, and the conditional seller or his credit manager usually procures the warrant and handles the litigation which ensues in the small claims court from which the warrant was issued. The second reason for the popularity of the detinue warrant is that, under section 8-593,<sup>60</sup> the remedies are rather stereotyped and the conditional seller knows the worst he can expect; sellers are not certain what the trial court will do when resort is had to the other in-court remedies. The third reason is not noble. By using detinue the seller has an opportunity to make a capital gain because if the buyer does not appear to defend (and in the larger percentage of the cases he does not), there is, in practice, almost automatic judgment awarding the goods to the seller. If the goods are in good condition and the buyer has paid a substantial portion of the purchase price, an excellent gain can result to the seller.

But what has long been ignored is the effect that *Lloyd v. Federal Motor Truck Co.*<sup>61</sup> has on the seller's use of the simple proceeding afforded by detinue. That case has been accepted as laying down the proposition that when a seller recovers possession of the goods in an action of detinue, he loses his right to recover a deficiency judgment even though the contract provides otherwise. Although it might be heralded as a case protecting buyers, perhaps the rule of the case needlessly detracts too much from the seller's reasonable expectations of his rights and in the long run injures buyers by tempting sellers to use questionable, even illegal, means of obtaining peaceable repossession.

Putting a rule in its operating context offers a test of its efficiency:

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<sup>59</sup>There are two detinue statutes applicable to retail instalment sales. See notes 60 and 65 *infra*.

<sup>60</sup>"[W]hen in any such action [detinue] or warrant the plaintiff shall prevail under a contract, which regardless of its form or express terms, was in fact made to secure the payment of money to the plaintiff or his assignor, judgment shall be for the recovery of the amount due the plaintiff thereunder, or else the specific property, and costs, and the defendant shall have the election of paying the amount of such judgment or surrendering the specific property. And the court or trial justice may grant the defendant a reasonable time, not exceeding 30 days, within which to discharge such judgment upon such security being given as the court or trial justice may deem sufficient." Va. Code Ann. § 8-593 (1950).

<sup>61</sup>168 Va. 72, 190 S.E. 257 (1937).

Again assume the purchase of a television set on conditional sale contract. The buyer has paid \$40 down on a \$400 set and has defaulted on the first payment; his five children have reached, but not exceeded, the outer limits of "normal wear and tear"; the set has a market value of only \$150. The buyer is a belligerent and cantankerous soul, who refuses and is able to resist peaceable repossession. What choices does the seller have here? If he brings detinue he can get only the television set, no deficiency.<sup>62</sup> If he uses one of the other legal remedies, he might be awarded a deficiency judgment (although he cannot be certain), but he would be compelled to hire a lawyer to draft his petition or other pleadings. The temptation would be strong to try for peaceable repossession at any price. Here indeed is a strange rule. The temperament and character of the buyer can determine whether the seller, as a practical matter, gets a deficiency judgment which has not been sapped of meaning by attorney's fees.

Has this situation been altered by the latest statutory addition to the seller's remedies, section 55-94? This statute, enacted without repeal or modification of the prior detinue statute (section 8-593), provides that the trial court in an action of detinue to enforce a contract to secure unpaid purchase money may "enter such judgment as shall seem right and proper. It may order the property . . . sold; or order the property . . . returned to the [vendor]."

Professor Ritz has explored the problems raised by this latest enactment. He asks whether the statute supersedes the older detinue statute, thus taking away from buyers the option of paying and recovering the property, or whether the statute is to be construed together with section 8-593 and the two harmonized. In either event, is the conditional vendor now entitled to recover a deficiency judgment when he brings an action of detinue?<sup>63</sup> Professor Ritz raises, but does not answer, the first two questions. However, he does conclude that the conditional seller probably is not entitled to recover a deficiency judgment in an action of detinue, that the rule of the *Lloyd* case still obtains.<sup>64</sup>

If Professor Ritz is correct, then the seller's remedy of detinue is today still subject to the objection hereinbefore made, that is, sellers in Virginia do not have an adequate remedy to procure a deficiency judgment in a proper case against a defaulting buyer who resists

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<sup>62</sup>*Ibid.*

<sup>63</sup>Virginia Code Commission, Report on Uniform Commercial Code, H. Doc. No. 28, pp. 238-39 (1956).

<sup>64</sup>*Id.* at 239.

peaceable possession. Again, if Professor Ritz's analysis is correct, what is the purpose of section 55-94? If purposes can be found, it would seem that one of them is to render *some* practical protection to the buyer who has a substantial equity in the goods. Section 8-593 (the original *detinue* statute), by allowing the buyer to elect to recover the goods by paying the balance due, appeared to give a buyer such protection, but the protection was often theoretical only. A buyer who could not afford to meet the payments usually could not afford to pay out the balance which had been accelerated, and, except for small loan companies, he was rarely a fit subject for a loan no matter how substantial his equity. Section 55-94 can, and should, be construed so as to partially remedy this situation because even if the buyer does not appear, the court would seem to be under an obligation to examine the whole transaction and, where the buyer's equity appears to justify it, order a sale of the property.<sup>65</sup> Although the statute does not so state, there would seem to be no doubt that any excess from the sale would go to the buyer. It should be emphasized, however, that this slight protection will be afforded buyers only when they have not been beguiled, deluded, tricked, or trapped into releasing possession of the property to the seller; for once the seller has obtained peaceable possession, the field is clear for him to wipe out the buyer's equity with impunity.

Thus, even if the Supreme Court of Appeals were to hold, contrary to Professor Ritz's prediction, that section 55-94 gives the seller a right to a deficiency judgment, thus closing one of the gaps in the seller's remedies, the buyer's equity would still not be adequately protected in event of peaceable repossession.

### *C. Action at Law for the Purchase Price*

In suing for the purchase price the seller may adopt either of two courses of action. He may sue for the past due instalments only,<sup>66</sup> or he may sue for the entire balance due (whether due because of ac-

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<sup>65</sup>There would seem to be no reason why both *detinue* statutes, §§ 8-593 and 55-94, should not be construed as supplementing each other. Thus, in an action of *detinue*, the trial judge, depending on the facts of the individual case, could: (1) give the buyer an opportunity to pay the balance due within thirty days (this is equivalent to a right to redeem); (2) award the property, or some part thereof, to the seller in satisfaction of the balance due; or (3) order the property, or some part thereof, sold and the proceeds distributed according to the interests of the parties. Any apprehension that the latter statute (§ 55-94) superseded the earlier statute could be eliminated by consolidation of the two statutes; the remedy then afforded by *detinue* could be made into a workable one by a clear statutory expression in the consolidated statute to the effect that the seller was entitled to a deficiency judgment in a proper case.

<sup>66</sup>*Jones v. Morris Plan Bank*, 168 Va. 284, 191 S.E. 608 (1937).

celeration or lapse of time).<sup>67</sup> Both have some risk for the seller. In suing for only the past due instalments, the seller runs the risk that his "paper work" may be defective. If the acceleration clause in the instrument on which the seller sues does not contain the magic words, *acceleration at the option of the holder*, or their equivalent, the seller will find himself in the position of having permanently lost both his security interest in the chattel and the right to sue on the instrument for additional payments.<sup>68</sup> In suing for the entire balance due, the seller runs the risk of the court subsequently invoking the doctrine of election and declaring that by procuring judgment the seller has lost his security interest in the chattel.<sup>69</sup> Subsequent bankruptcy of the buyer would permit the trustee in bankruptcy to disregard the forfeited security interest or claim a preference or lien by legal proceedings.<sup>70</sup> There are no Virginia cases directly on this point.

The prevalence of forms containing clauses expressly giving holders the option to accelerate probably renders action to eliminate the first pitfall unnecessary. It would seem, however, that the seller should be permitted to pursue his *in personam* remedy without waiving his *in rem* rights in the chattel; the seller's remedies should be made cumulative and not in the alternative.<sup>71</sup> This would be in keeping with the seller's expectations and, it is submitted, could improve rather than impair the protection given the buyer. It could improve the protection given the buyer to allow the security interest to continue beyond judgment (and until satisfaction) because there seems to be little doubt that it is permissible for sellers (and it is the practice of some sellers) to obtain judgment for the price and then proceed to levy upon

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<sup>67</sup>Ibid.

<sup>68</sup>Ibid. This result was reached by the court construing the acceleration clause as not permitting acceleration at the option of the holder. From this it followed that the seller had split his cause of action and, having obtained judgment and satisfaction for a part of the purchase price, was barred, because of the doctrine of *res judicata*, from asserting a claim for the balance due. The case is unique in that the seller's assignee made peaceable repossession and the buyer sued for conversion. The seller's assignee asserted that he had a security interest which gave him a right to repossess. The court held otherwise. Query as to whether an action for unjust enrichment would lie against the buyer?

<sup>69</sup>See *Frisch v. Wells*, 200 Mass. 429, 86 N.E. 775 (1909), and Braucher, *Sutherland and Willcox, Commercial Transactions, Cases and Problems*, 300-01 (1953).

<sup>70</sup>In *re Fitzhugh Hall Amusement Co.*, 230 Fed. 811 (2d Cir. 1916).

<sup>71</sup>Cf. U.C.C. § 9-501(1), which provides: "When a debtor is in default under a security agreement, a secured party has the remedies provided by this Part, which are cumulative. In addition, he may reduce his claim to judgment, foreclose the security interest by any available judicial procedure, or both . . ."

and sell the chattel sold under the conditional sales contract.<sup>72</sup> While this has the beneficial effect of placing the sale under the jurisdiction of the court, the scanty advertisement given execution sales in Virginia<sup>73</sup> and the failure to attract bidders usually result in the seller being able to buy the goods at a low price and then holding the buyer for the deficiency.<sup>74</sup> It would seem that buyers with a substantial equity would be better protected by allowing the seller's security interest to continue after judgment, denying the seller a right to levy on those goods but allowing him to make sale in a manner which is more adequately designed to protect the buyer's equity, or, in a proper case, by allowing him to repossess by legal process and to credit the judgment with the fair market value of the goods.

*D. Statutory Remedy by Petition or Bill in Equity  
under Section 55-91<sup>75</sup>*

The purpose of this statute, as expressed by the court, was to afford a remedy in one proceeding as a substitute for the action of detinue for the recovery of the property, for a suit for the enforcement of the lien, and for a decree for the balance due.<sup>76</sup> When this proceeding is used the court may sell the property; if the proceeds of the sale do not cover the seller's claim, a deficiency judgment may be entered. Although the statute does not expressly so state, apparently any excess from the sale would be awarded the buyer.

As has been suggested previously, the requirement that this proceeding be instituted by petition (as distinguished from warrant) in the

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<sup>72</sup>See *Universal Credit Co. v. Taylor*, 164 Va. 624, 626-27, 180 S.E. 277, 278-79 (1935): "Defendants concede that plaintiff, under the terms of the conditional sales contract, before repossessing the truck, had a right to institute an action at law for the recovery of the unpaid purchase price . . . , a suit in equity or to proceed under Section [55-91] to foreclose the lien on the truck and for deficiency judgment . . . ."

"If plaintiff had elected to pursue any one of the above remedies the result would have been to deprive defendants of any right or interest in the truck which would have been sold at public auction *under an execution* or by order of the court: the net proceeds of sale would have been credited on the execution in the one case, and on the unpaid purchase price in the other, and a judgment rendered against defendants for the balance due."

<sup>73</sup>Va. Code Ann. § 8-422.1 (1957 Repl.) requires posting at two public places and posting at some place near the residence of the owner if he be a resident of the officer's jurisdiction.

<sup>74</sup>By following this procedure a shrewd seller can obtain both possession of the goods and a deficiency judgment although if he had utilized a remedy which placed the case before the court for decision on the merits, he may have been found not entitled to both.

<sup>75</sup>See note 13 *supra*.

<sup>76</sup>*Southern Mfg. & Supply Co. v. Klavan*, 125 Va. 438, 440, 99 S.E. 566, 567 (1919).

small claims courts has been one factor which has prevented sellers from freely using this remedy. The filing of the petition requires the services of an attorney; that an attorney will charge for his services is certain; that a deficiency judgment will be collected is not. If section 55-94 (latest detinue statute) were amended so as to clearly give the seller a right to a deficiency judgment, this would not only equate the remedy in detinue with the statutory remedy, but would eliminate the necessity of the seller having to hire an attorney to obtain a deficiency judgment.

When the amount claimed by the seller warrants the bringing of this statutory proceeding by bill in equity, there is probably no difference between the scope of authority of the court under the statutory remedy and what it would do if the proceeding had been by bill in equity independent of the statute. One of the three reported cases involving a proceeding under the statute is a case in which it appears that the plaintiff had no right to invoke the aid of the statute;<sup>77</sup> apparently no assignment of error was directed to this point and the court did not mention it in the opinion. The significant thing, however, is that if this case illustrates a correct procedural use of section 55-91, then the statutory remedy is *procedurally* broader, though probably not substantively broader, than the pure bill in equity.<sup>78</sup>

#### E. Suit in Equity

In one reported case a suit in equity was used by the seller's assignee.<sup>79</sup> This case, and dicta of the court in other cases,<sup>80</sup> indicate that the Supreme Court of Appeals does not consider the statutory remedy under section 55-91 as having supplanted the use of a suit in equity to enforce the lien created by a conditional sale contract. The court has neither passed upon nor discussed the disposition of the security or the rights and obligations of the buyer and seller when this remedy is used. A safe assumption would be that the court would follow the traditional remedy of foreclosure by sale, and, in proper cases, award any surplus to the buyer or decree a deficiency to the seller.<sup>81</sup>

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<sup>77</sup>See note 51 *supra*. In addition to the Ashworth case, the two other cases are: *Liquid Carbonic Co. v. Whitehead*, 115 Va. 586, 80 S.E. 104 (1913); *Mitchell Ice Co. v. Triumph Elec. Co.*, 116 Va. 725, 82 S.E. 730 (1914).

<sup>78</sup>This is but a rather awkward way of expressing the belief that in Ashworth the plaintiff, by utilizing § 55-91, was allowed to use what appeared to be an action at law (for conversion or breach of contract) on the equity side of the court.

<sup>79</sup>*Universal Credit Co. v. Botetourt*, 180 Va. 159, 21 S.E.2d 800 (1942).

<sup>80</sup>See note 32 *supra*.

<sup>81</sup>This is the accepted method of foreclosing mortgages (and, in unusual cir-



There is no separation of law and equity procedure on the small claims court level. An attempt to file a bill in equity in such court would probably be construed as a request to invoke the court's jurisdiction under section 55-91. This would be of no real significance because the remedies by suit in equity and under section 55-91 are for most purposes probably equivalent.<sup>82</sup> The remedy by suit in equity suffers from the defect of requiring an attorney to draft the pleadings; except when the goods were of substantial value, attorney's fees would wipe out any advantage accruing to the seller from the use of a suit in equity.

#### IV. RIGHTS AND DUTIES OF SELLER AND BUYER THAT CANNOT BE MODIFIED BY CONTRACT

The local encyclopedia and other sources of Virginia law outline many rights and duties of the buyer and seller in a retail instalment sale.<sup>83</sup> What is not made emphatic is that, strictly speaking, there appear to be only two legal obligations existing between the buyer and the seller which present statutory and case law refuse to allow the seller to escape by a change in the terms of the original contract. These are: (1) The seller cannot recover a deficiency judgment after peaceful repossession unless he gives notice and holds a public sale,<sup>84</sup> and (2) the seller cannot obtain a deficiency judgment when he recovers possession of the goods by the action of detinue.<sup>85</sup>

So far as existing case law and statutes take us, the buyer's right to recover an excess from any sale, and the seller's right to recover expenses of taking possession, repairing, and making sale<sup>86</sup> are all dependent for their existence upon express provisions to that effect being inserted in the contract. The court's repeated insistence that the

cumstances, deeds of trust) on realty in Virginia. See, e.g., *Woodhouse v. Harrison*, 168 Va. 574, 191 S.E. 776 (1937).

<sup>82</sup>But see note 78 *supra*.

<sup>83</sup>Michie's Jurisprudence, Chattel Mortgages and Conditional Sales, §§ 22-24; 2 CCH Cond. Sale & Chat. Mortg. Rep. (Va.) §§ 280, 290, 300, 305, 310, 315, 320, 330, 600, 630.

<sup>84</sup>Va. Code Ann. § 55-93 (1950). But this right may be surrendered by the making of a new contract between buyer and seller after default.

<sup>85</sup>*Lloyd v. Federal Motor Truck Co.*, 168 Va. 72, 190 S.E. 257 (1937). But it should be noted that the *Lloyd* case is not clear authority for the above proposition even though it has been so interpreted by the bench and bar. In *Lloyd* the evidence clearly showed that the plaintiff, seller, was not entitled to a deficiency judgment, and, further, the seller did not attempt to recover the deficiency in the action of detinue itself but instituted a separate action for the deficiency.

<sup>86</sup>*Lynchburg Motor Co. v. Thomasson*, 141 Va. 153, 126 S.E. 64 (1925); *Universal Credit Co. v. Botetourt*, 180 Va. 159, 21 S.E.2d 800 (1942).

whole transaction is to be governed by the agreement<sup>87</sup> makes sense when the terms of the agreement are indeed bargained ones; it seems to be the height of legal inanity to apply such concept to all the terms of the retail instalment sale contract, which, although it represents a bargain or agreement between buyer and seller, is rarely, if ever, the subject of bargaining as to its terms of default and repossession. In the face of such a judicial attitude, would the concept of the equity of redemption as applied to mortgages of realty ever have originated?

#### V. VARIATIONS IN OBLIGATION BETWEEN BUYER AND SELLER IF THE CONTRACT IS ORAL

As further evidence of the small amount of thought that has been given to the law of retail instalment sales in Virginia, there is the odd shifting in the remedies available to the seller that occurs when the contract is merely oral.<sup>88</sup> If the contract is oral, sections 55-91 (petition), 55-93 (seller has rights to deficiency if holds public sale), and 55-94 (latest detinue statute) do not apply. At first glance these omissions seem to rightfully "punish" the seller for not having put the contract in writing, and so to compel indirectly disclosure to the buyer of the terms of the contract. But do they? As regards the rights between buyer and seller, which party stands to gain or lose if the contract is not reduced to writing?<sup>89</sup>

If the contract is oral it appears that the seller has only the following remedies: (1) suit for the purchase price, (2) action of detinue under section 8-593, (3) suit in equity, and (4) peaceful repossession.

Here is the significant thing however. If the seller under an oral conditional sale contract takes peaceful repossession, then section 55-93 (which requires that on *written* contracts the seller hold public sale

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<sup>87</sup>*Lynchburg Motor Co. v. Thomasson*, 141 Va. 153, 126 S.E. 64 (1925); *Universal Credit Co. v. Taylor*, 164 Va. 624, 628, 180 S.E. 277, 279 (1935); *Universal Credit Co. v. Botetourt*, 180 Va. 159, 21 S.E.2d 800 (1942).

<sup>88</sup>The observations which next follow do not apply with full vigor to the instalment sale of automobiles. As to automobiles the contract is required to be reduced to writing and a written statement of the finance and insurance charge furnished the buyer prior to or at about the time of delivery of the vehicle. Va. Code Ann. § 46-532 (1950). See also Va. Code Ann. § 46-536 (1950) making it unlawful for a dealer to coerce the buyer to provide insurance coverage. These disclosure provisions are not effective because the buyer does not receive the information until after he has become obligated.

<sup>89</sup>The seller is not protected against bona-fide purchasers from and creditors of the buyer unless the contract is evidenced by a writing and filed. Va. Code Ann. § 55-58 (1950).

before being entitled to a deficiency judgment) does not, by its express terms, apply. A possible result? The transaction falls under the rule of *Universal Credit Co. v. Taylor*,<sup>90</sup> which allows a deficiency judgment after peaceable repossession not followed by public sale. This should not be, and may not be, the law; it is, however, what the statute (section 55-93) and the more obvious principles of statutory construction say is the law. Also, when the contract is oral, the buyer loses his rights under section 55-94, the latest detinue statute, which appears to place the buyer's equity under the supervision of the court and permits the court to sell the property in a proper case. It is peculiar law that gives a seller greater rights on an oral contract than he would have on the same contract reduced to writing.

#### VI. STATUS OF REPURCHASE AGREEMENTS IN VIRGINIA

The use of the repurchase agreement is one means of shifting the ultimate risk of nonpayment from lender back to seller; the device is relied upon by lenders in addition to the security in the goods and the personal obligation of the buyer. In legal analysis the repurchase agreement would seem to be tantamount to the dealer (or manufacturer, or both) being surety for the buyer to the extent of the unpaid balance due the lender, but with the equitable right of subrogation to the lender's security interest sometimes impliedly elevated to a contract right by provisions in the repurchase agreement. This equitable or implied contract right to be subrogated to the lender's security should not be destroyed or obfuscated by legal technicalities or by a failure to use some particular phrase at exactly the correct time. But, in Virginia, thanks to *Federal Motor Truck Co. v. Kellenberger*,<sup>91</sup> it is.

The facts of the *Kellenberger* case are interesting: Kellenberger, a dealer in Federal trucks, sold a Federal truck to one Miller, taking a conditional sales contract and note for the balance due. Kellenberger assigned the contract and note to C.I.T. and executed a repurchase agreement running to C.I.T. The opinion discloses that Federal Motor Co. had also executed a blanket repurchase agreement covering Federal trucks to C.I.T. However, counsel did not introduce the Federal-C.I.T. repurchase agreement itself in evidence. Miller defaulted; C.I.T. repossessed. There then ensued what was obviously a struggle between Kellenberger and Federal Motor Co. as to which

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<sup>90</sup>164 Va. 624, 180 S.E. 277 (1935).

<sup>91</sup>193 Va. 882, 71 S.E.2d 177 (1952).

one would pay C.I.T. under the repurchase agreements. C.I.T. "played along" with Federal Motor Co. and attempted to conceal from Kellenberger that Federal Motor Co. had already paid the balance due and that the repossessed truck had been "sold" to Federal Motor Co. The correspondence between C.I.T. and Federal Motor Co. was in terms of a "sale" of the truck rather than an "assignment" or "repurchase" of Miller's contract. Without crediting the proceeds from, or the value of, the truck to the unpaid balance, Federal Motor Co. sued Kellenberger, its dealer, on Kellenberger's repurchase agreement with C.I.T.; plaintiff claimed the entire balance due from Miller. Kellenberger's defense was that the transfer of the truck from C.I.T. to Federal Motor Co. was a "sale" of the truck and that Federal was barred from collecting a deficiency judgment because the sale was not public as required by section 55-93!

It took two trials in a lower court and an appeal to establish that Federal could not, on these facts, recover from Kellenberger. Why? Because, said the court, a jury could find that there had been a sale of the truck from C.I.T. to Federal Motor Co., and, the sale not being public, section 55-93 prevented recovery. The result reached is correct, the reason patently wrong and disquieting to sellers who are obligated to take up repurchase agreements. Section 55-93 was not intended to have application except as between the original buyer (consumer) and the seller or his assignee; it was not the purpose of the statute to regulate the obligations between co-sureties for the buyer's debt.

A suggested analysis of the *Kellenberger* case is that Kellenberger and Federal Motor Co. were co-sureties for Miller's debt to C.I.T.; that a co-surety cannot sue another for the full amount he has paid but only for contribution for any excess above his pro rata share;<sup>92</sup> that before suing for contribution he must first credit the obligation with the sums received from, or the value of, any security which he may have acquired by subrogation.<sup>93</sup> Since Federal Motor Co. failed to do this, it should not be permitted to recover anything in its action against its co-surety.

It is possible that in its concern over having to remand the case for a third trial to obtain the evidence necessary to develop this theory, the court took what appeared to be the easy way out and allowed Kellenberger's defense. But in so doing the court clouded the

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<sup>92</sup>*Young v. Bowen*, 131 Va. 401, 108 S.E. 866 (1921); *Gordon v. Rixey*, 86 Va. 853, 11 S.E. 562 (1890).

<sup>93</sup>*Givens v. Nelson*, 37 Va. (10 Leigh) 382 (1839).

legal efficacy of action which had previously been taken under many repurchase agreements. Until this case is distinguished, or changed by statute, sellers should take extreme care, in their correspondence with lenders, about repurchase and transfer of the goods, to use phrases such as "assign" or "repurchase" the *contract* and the like, rather than "sale" or "repurchase" of the *goods*. *Kellenberger* says that failure to do so can result in their inability to sue the buyer for a deficiency judgment. If one believes in reincarnation, livery of seisin is not dead; its rigid requirement of an exacting ritual, rather than regard for the purpose of the parties, lives again in the *Kellenberger* rule.

### VII. THE "LAY-AWAY" PLAN

Utilizing what has been characterized as an unpaid seller's lien,<sup>94</sup> sellers of clothing, furniture, and other goods often retain possession of the goods until a purchase price, payable in instalments, has been paid in full. What are the rights of buyer and seller in event of default? Neither case nor statute answers this question in Virginia.

A New York court held that in event of default the buyer forfeited all payments made and that the seller retained the goods with no duty to account to the buyer.<sup>95</sup> Shortly thereafter New York adopted a statute which avoids harsh forfeiture and at the same time protects the seller against any actual damages he may have suffered from default.<sup>96</sup> The *Uniform Commercial Code* contains an ambiguous

<sup>94</sup>*Bisner v. Mantell*, 197 Misc. 807, 95 N.Y.S.2d 793 (1950).

<sup>95</sup>*Ibid.* This is in accord with the majority common law rule which is based on the theory that a defaulting vendee should not be permitted to take advantage of his own wrong by avoiding the contract and receiving reimbursement. The minority rule and trend are to the contrary. See, e.g., *Bird v. Kenworthy*, 265 P.2d 943 (Cal. App. 1954), *aff'd*, 43 Cal. 2d 656, 277 P.2d 1 (1954), in which the court allowed the defaulting buyer to recover a portion of his payments on a theory of unjust enrichment. For collections of the cases and discussions see Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 Yale L.J. 1013 (1931); Note, 38 Minn. L. Rev. 172 (1954); Note, 8 Okla. L. Rev. 81 (1955).

<sup>96</sup>N.Y. Pers. Prop. Law § 145-a: "1. Where the buyer has defaulted by failing to pay money or transfer goods as required of him by the contract of sale but has made payments or transfers of goods in part performance of the contract, and the seller fails or refuses to deliver the goods which he had contracted to deliver and is justified therein by the buyer's default, the buyer is entitled to restitution of that amount, if any, by which the payments he has made, or the reasonable value of the goods at the time of the transfer or, as the case may be, of the sum thereof, exceeds

"(a) the amount to which the seller is entitled by the terms of a clause, if any, in the contract, which constitutes a reasonable liquidation in advance of the seller's anticipated damages; or

"(b) in the absence of such a clause, twenty per cent of the value of the total performance for which the buyer is obligated under the contract.

version of the New York statute.<sup>97</sup> The New York statute could be adopted in Virginia with no change in existing statutes, and it is suggested that consideration be given to its adoption.

#### VIII. CONCLUSIONS AND RECOMMENDATIONS

The Virginia law governing default suffers from two basic defects: (1) gaps and uncertainty, and (2) lack of purposive direction. The gaps and uncertainty are evidenced by the law's failure to answer such questions as: Does the seller have a right to a deficiency judgment in an action of detinue? Does the buyer have a legal right to redeem the goods before sale? Are the seller's remedies cumulative to the point of satisfaction? Under what circumstances may a buyer recover from a repossessing seller? What are the legal obligations of the parties to a "lay-away" plan? The lack of purposive direction is exemplified by a system which does not give the seller an effective judicial remedy to recover a deficiency judgment on the one hand, and fails to protect the buyer's equity on the other hand.

Virginia sellers are apparently content with this legal system; buyers are content, ignorant of a better way of legal life, or rendered inarticulate by lack of funds. Neither buyers nor sellers have manifested any lack of confidence in their system. But will it be so when, and if, the lubricant of prosperity oxidizes and these incongruous rights and remedies grate together in a market filled with strongly competing sellers and defaulting or reluctant buyers?

By way of recommendation, consideration should be given to the adoption of article 9 of the *Uniform Commercial Code*,<sup>98</sup> a study of Retail Instalment Sales Acts should be made and the better provisions

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"2. The buyer's right to restitution as defined in subdivision one is subject to offset,

"(a) in the absence of a liquidated damage clause described in subdivision one, by the amount of damages suffered by the seller, . . . and

"(b) in any case, by the amount or value of the benefits, if any, received by the buyer directly or indirectly by reason of the contract. In any action or counterclaim by the buyer seeking restitution as provided in this section, the seller seeking to deny or reduce the amount of his liability to make restitution shall have the burden of proof as to his offset.

"3. The provisions of this section shall not apply if the transaction is governed by the Uniform Conditional Sales Act."

<sup>97</sup>U.C.C. § 2-718. This ambiguity has been eliminated in the Massachusetts version of the Uniform Commercial Code.

<sup>98</sup>However, this would have the effect of tending to delay the adoption of the Code in its entirety. Article 9 is considered one of the selling points of the Code.

of such acts adopted and extended to goods other than motor vehicles.<sup>99</sup>

If such wholesale change in the law is repulsive or impracticable,<sup>100</sup> consideration should be given to the adoption of a skillful statutory blend of the default provision of article 9 of the *Uniform Commercial Code* and section 145-a of the New York Personal Property Law.

In any event, six slight, but important, changes in existing law should be made: (1) Section 55-94 (latest detinue statute) should be amended to make it clear that the seller has a right to recover a deficiency judgment in an action of detinue in a proper case; (2) The provisions of section 8-593 (old detinue statute) relating to purchase money contracts should be transferred into section 55-94; (3) Section 55-91 could then be repealed;<sup>101</sup> (4) Section 55-93 (no deficiency judgment unless public sale) should be amended to make public sale and accounting mandatory when the buyer has paid a specified percentage of the purchase price;<sup>102</sup> (5) Section 55-93 should be amended to make it clear that it was not intended to have application to the exchanges taking place under a repurchase agreement; and (6) The substance of section 145-a of the New York Personal Property Law should be enacted in Virginia.

<sup>99</sup>The present Virginia Retail Instalment Sales Act applies only to motor vehicles and contains only weak, ineffective disclosure provisions. Va. Code Ann. §§ 46-532 and 46-536 (1950). See note 88 *supra*.

<sup>100</sup>See Virginia Code Commission, Report on Uniform Commercial Code, H. Doc. No. 28, p. ii (1956), giving reasons for recommending that the code not be adopted in Virginia.

<sup>101</sup>There would be no need for § 55-91, the statutory remedy. Its provisions would be paralleled in the combination of §§ 55-94 and 8-593 to which there had been added the seller's right to recover a deficiency judgment; such combined statute would eliminate the necessity of the seller having to employ an attorney to bring the form of action necessary to the recovery of a deficiency judgment (except, of course, when the action was required to be brought in a court of record, where formal pleadings are necessary).

<sup>102</sup>Further, in such cases, the seller should be given a maximum time within which to sell and account. The sanctions to induce the seller to comply could be such as are found in the U.C.C. §§ 9-505 (1) and 9-507. The latter section allows a minimum recovery to the buyer though he suffered no actual damages.

Whether to allow the seller and buyer to dispense with public sale is a vexing question. Often it is to the advantage of both parties to do so. However, sellers are prone to follow a routine procedure of exacting such agreements from buyers who do not understand the implications of their action. At least two compromise solutions are available: (1) permit the seller and buyer to dispense with public sale, but the seller must accept the goods in full satisfaction of the balance due, or (2) require that the new agreement between buyer and seller be in writing and that the writing contain a statutory statement of the rights which the buyer is foregoing. Language and instalment buyers being what they are, the former proposal seems preferable.

## MODERN TRENDS IN TRIAL BY JURY

ALEXANDER HOLTZOFF\*

Trial by jury is one of the outstanding contributions to jurisprudence made by the English common law. The basic concept of the participation of the public in the administration of justice had not been entirely unknown. It had previously existed in various forms, as for instance in ancient Athens.<sup>1</sup> The novel features of the English jury system consisted of the selection of a small specified number of laymen taken temporarily from the community to sit under the guidance of permanent professional judges from whom the jury received instructions and advice; of the requirement of unanimity; and of the cooperation of the jurors and the judge, each performing different functions leading to a determination of the controversy presented for decision.

The common law jury as it developed in England is thus characterized by a number of essential features. The first is that the jury is composed of a small specified number of members, the historic figure being twelve. The second is that the decision of the jury must be unanimous. Unanimity is important and vital, for two reasons: first, it leads to a more thorough consideration of the questions at issue and a more careful deliberation in the jury room than might otherwise be the case, since debate and discussion must continue until a unanimous verdict is reached; and second, the fact that the verdict is unanimous is in itself strong assurance of its fairness and justice. The only possible drawback to the requirement of unanimity is that occasionally it leads to a deadlock and thereby requires re-trial before another jury. The percentage of cases in which this happens in juris-

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<sup>1</sup>Wigmore, *Panorama of the World's Legal Systems* 287-314 (1936).



dictions in which the common law system still prevails is, however, not sufficiently large to constitute an important factor.

The next inherent feature is that the jury decides only issues of fact, while the judge rules on all questions of law. The final cardinal characteristic of the common law trial by jury which is of utmost importance is that at the end of the trial the judge instructs the jury. While the American terminology is that the judge "instructs" or "charges" the jury, the English phrase is that the judge "sums up the case" or "directs the jury." His instructions are binding on the jury as to the law. The jury must apply the rules of law laid down by the judge to the facts it finds. In addition to instructing the jury on the law, the judge performs an additional function at the same time. He advises the jury as to the facts, that is, he points out the issues of fact, summarizes the salient evidence on both sides and possibly comments on specific items of evidence. He may even express his opinion, if he deems it wise to do so, as to the weight or effect of any part of the testimony and even as to the ultimate issue to be determined by the jury. He must make it clear, however, that his discussion of the evidence is not binding, but merely advisory, and that the jury is to be the final judge of the facts. Thus the jury does not sit as a group of arbitrators deciding the issues in controversy in accordance with its own view of substantial justice, but reaches its decision under the guidance of the judge as to the law and with the help of the judge's advice as to the facts. All of these features in combination account for the success of trial by jury over the centuries.

The common law concept of the judge's function in connection with instructing the jury has been formulated in various ways by famous English commentators. Sir Matthew Hale, in language that today seems quaint, stated that it was the function of the trial judge in matters of fact to give the jury "great light and assistance by his weighing the evidence before them and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact, which is a great advantage and light to laymen."<sup>2</sup> Blackstone enunciated a similar thought as follows:<sup>3</sup>

"When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it,

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<sup>2</sup>Hale, *History and Analysis of the Common Law of England* 259.

<sup>3</sup>Blackstone, *Commentaries* \*375.

with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."

These doctrines are so much a part of the warp and woof of the common law and are deemed to be of such an elementary nature that there are comparatively few English judicial decisions dealing with this subject. In one case, however, it was observed that "it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind."<sup>4</sup> In another case Lord Tenterden stated that "we are all, however, agreed, that notwithstanding I did intimate to the jury my opinion upon the subject, yet as I left it to them to exercise their own discretion, and to draw their own conclusion from the evidence, we ought not to disturb this verdict. . . ."<sup>5</sup>

Passing to more recent expressions of this doctrine, in *Rex v. O'Donnell*<sup>6</sup> the Court of Criminal Appeal stated:

"[A]s this Court has said on many occasions . . . a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision, and therefore this point also fails."

A late English formulation of this principle is found in Halsbury's *Laws of England*,<sup>7</sup> which contains the following remarks on the subject:

"After the close of the reply of the counsel for the prosecution, or if there is none, after the final speech of the defendant or his counsel, the presiding judge sums up the whole case and the evidence to the jury and gives his direction on the matters in issue and on the points of law applicable to these matters. . . .

"A judge must leave the facts for the jury to decide and should not invite the jury to make a particular finding, though he is entitled to express his views strongly."

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<sup>4</sup>Davidson v. Stanley, 2 Man. & Gr. 721, 728, 133 Eng. Rep. 936, 939 (1891).

<sup>5</sup>Solarte v. Melville, 7 B. & Cress. 430, 435, 108 Eng. Rep. 784, 785 (1827).

<sup>6</sup>12 Cr. App. Rep. 219, 221 (1917).

<sup>7</sup>10 Halsbury, The Laws of England §§ 779-80 (3d ed. 1955).

The American colonists brought the common law jury with them to this continent. The Founding Fathers were profound scholars. They were thorough students of history and law. It was their desire to preserve and perpetuate the private rights to which Englishmen had been accustomed. In fact, one of the grievances that led to the American Revolution was the disregard by the English government of the privileges of the colonists as Englishmen. One of these fundamental rights was trial by jury.

In order to safeguard this privilege and prevent any encroachment upon it, it was provided in article III, section 2, clause 3, of the Constitution of the United States, that "the trial of all crimes, except in cases of impeachment, shall be by jury." This provision was in effect reiterated in the sixth amendment, which reads that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." Constitutional sanction was accorded to trial by jury in civil cases by the seventh amendment, which provides that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

These clauses of the Constitution of the United States have been construed as not merely guarantying trial by jury generally, but as perpetuating trial by jury in the form in which it was known at common law. Thus in *United States v. Philadelphia and Reading R.R.*,<sup>8</sup> trial by jury in the federal courts was defined in the following language:

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

The same thought was enunciated in *Capital Traction Co. v. Hof*<sup>9</sup> as follows:

"'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested

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<sup>8</sup>123 U.S. 113, 114 (1887).

<sup>9</sup>174 U.S. 1, 13 (1899).

with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."

Later, Chief Justice Hughes, in *Quercia v. United States*,<sup>10</sup> likewise gave expression to the same principles:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. [citation omitted.] In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. [citations omitted.] . . . Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts."

Expressions of these ideas in opinions of the federal courts are legion. Two recent statements are typical. The United States Court of Appeals for the Second Circuit said in *United States v. Rosenberg*:<sup>11</sup>

"[U]nlike judges in many of our state courts, a federal judge may comment outright on any portion of the evidence, telling the jury how it struck him, whom he believed, or disbelieved, and the like, provided only that he advises the jury that they are in no way bound by his expressions of such views."

Similarly the United States Court of Appeals for the Sixth Circuit stated in *Stanley v. United States*:<sup>12</sup>

"The trial judge had a right to express his opinion to the jury since he gave them clearly to understand that the jurors were not bound by the judge's opinion, but were free to exercise their own judgment."

Thus trial by jury as known at common law persists in its original form in the English courts, as well as in federal courts in this country. English judges seem at times more likely to review the evidence in

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<sup>10</sup>289 U.S. 466, 469 (1933).

<sup>11</sup>195 F.2d 583, 594 (1952).

<sup>12</sup>245 F.2d 427, 436 (1957).

greater detail and are somewhat more emphatic in commenting on it and in expressing their opinion than is true of some federal judges, but in its essentials the same system prevails in both groups of tribunals.

An entirely different line of development, however, took place in many of the states. In the early years of the Republic in many quarters there was a popular distrust of judges inherited from some unfortunate experiences of the Colonists with Royal judges during the pre-Revolutionary era. Accordingly, some of the states began to curtail the judge's power to comment on the facts. Some went so far as to deprive him of the authority to summarize and discuss the evidence at all, but limited him to instructing the jury solely on the abstract principles of law, sometimes even imposing an additional restriction that this be done solely in writing. This movement started in North Carolina in 1795<sup>13</sup> and in Tennessee in 1796,<sup>14</sup> and it then spread unchecked to other states. The result was that very few of the states retained the common law concept of trial by jury. New Jersey and Pennsylvania continued to adhere to it. New York and Vermont modified it only to the extent of precluding the judge from expressing any opinion on the facts and on the weight of evidence. The remaining states may be divided into several groups. Some limited the judge to instructing the jury solely on the law, a few even confining him to giving such instructions in writing. Another group of states permitted the judge to summarize the facts, but not to comment on them.<sup>15</sup> Maryland was in an isolated position in that it empowered the jury to decide both the facts and the law. The practical result has been that in most state courts the jury became almost supreme and was at times likely to decide cases in accordance with its own ideas of substantial justice rather than in compliance with the governing principles of law.

A mere series of abstract principles of law stated by the judge is not always well understood, or practically applied by a group of laymen, if the judge is shorn of the power to discuss the facts and the evidence which must be measured by these rules. It is sometimes customary to speak of the right of the judge to discuss the facts and comment on the evidence. It should be better called the authority or power of the judge. It is the jury that has the right to receive the advice and assistance of the judge. It is the jury that under the pre-

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<sup>13</sup>N.C. Gen. Stat. § 1-180 (1953).

<sup>14</sup>Tenn. Const. art. 6, § 9.

<sup>15</sup>Vanderbilt, *Minimum Standards of Judicial Administration* 224-30 (1949).

vailing state system is deprived of the aid to which it was entitled at common law. Necessarily, in such instances the judge is transformed into not much more than a presiding officer or a moderator at the trial, while the jury tends to become sovereign. Extreme appeals of advocacy are more likely to sway or to have an undue effect on the jury under these circumstances, because it lacks the guidance and the stabilizing influence of the judge. Such criticisms as have been directed against the jury system generally relate to trials in the state courts and are due very largely to these circumstances.

The judge's discussion of the evidence is intended to assist the jury and thereby to aid it in arriving at a just result. It tends to clarify the issues, to enable the jury to discard extraneous matters that are at times injected into a trial, and to concentrate and focus the attention of the jury on the crucial points of the case. The judge is in a position to place the various items of evidence in their proper setting and to restore them to their correct proportions, rather than to permit them to remain in the distorted shape that at times they assume as a result of partisan presentation of counsel. On occasion the judge's observations may assist the jury in resolving doubts or misgivings as to the weight to be accorded or the importance to be attached to some phase of the evidence.

The test of desirability of the common law procedure is whether it is conducive to just verdicts and therefore aids in a proper administration of justice. This question answers itself. It is capable only of an affirmative response. Counsel for the parties are permitted to summarize the evidence and to comment on the facts from their standpoint. Their presentation must of necessity be one-sided and argumentative. The judge is the only impartial lawyer participating in the trial and the only lawyer in a position to give unbiased advice to the jury. It seems a paradox, therefore, to permit counsel to discuss the facts, but to bar the judge from doing so. It has been said by an eminent federal judge that "it is always the right of the federal judge to review and marshal the testimony, and it is often his duty, for in no other way can he more effectively promote the doing of justice."<sup>16</sup>

The only argument advanced against the common law procedure is the contention that the judge's advice is likely to influence the jury unduly. This objection was demolished by Chief Justice Taney in the following manner:<sup>17</sup>

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<sup>16</sup>Graham v. United States, 12 F.2d 717, 718 (4th Cir. 1926).

<sup>17</sup>Mitchell v. Harmony, 19 U.S. (13 How.) 420, 424 (1851).

"Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury."

One of the most experienced jurists of our time, who for many years had been a trial judge before his elevation to the appellate bench, Judge Learned Hand, observed that "the belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine."<sup>18</sup> In an earlier case, Judge Hand remarked that "juries are not leaves swayed by every breath."<sup>19</sup>

Judge Goodrich in the language of a homespun philosopher had occasion to make the following comment:<sup>20</sup> "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are."

Another important factor in respect to which there has been a departure in many states from the common law concept of a jury trial is the abandonment of the rule of unanimity. In many states less than a unanimous verdict is permitted in some cases. The purpose of unanimity has already been discussed. The only reason for abrogating the traditional rule is the avoidance of disagreements and the consequent necessity for new trials. In jurisdictions in which the judge has not been shorn of his common law power, the percentage of disagreements is small and not a sufficiently significant factor to require a change in the mode of administering justice.

Thus, it can be said that trial by jury as it exists in most of the states today is no longer the trial by jury originated by the common law and prevailing in England and in the federal courts. The differences are so marked as to lead to the conclusion that we are dealing with two different types of trials, and with two different institutions, when we refer to modern trial by jury in the United States. One, the common law form prevailing in the federal courts and a few states; and the other, that found in most of the states.

Some years ago, the American Bar Association undertook to lead a campaign to reinstate the common law jury trial in the states by restoring to judges the power to instruct the jury and to advise it on the facts and on the evidence. In 1938, the Section of Judicial Ad-

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<sup>18</sup>United States v. Goldstein, 120 F.2d 485, 491 (1941).

<sup>19</sup>United States v. Garsson, 291 Fed. 646, 649 (1923).

<sup>20</sup>Smith v. Philadelphia Transp. Co., 173 F.2d 721, 726 (1949).

ministration of the American Bar Association, under the chairmanship of Judge John J. Parker, appointed several committees to make a study of judicial procedure with a view to suggesting needed reforms and formulating standards that might serve as guides to those interested in improving the administration of justice. One of these groups was a Committee on Trial Practice, of which Judge Calvin Chesnut was Chairman. In its report the Committee discussed in some detail the proper function and authority of the trial judge. It made the following recommendations:<sup>21</sup>

1. That the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom.

2. That after the evidence is closed and counsel have concluded their arguments to the jury, the trial judge shall instruct the jury orally as to the law of the case, and he may advise the jury as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury.

At its annual meeting, the Section of Judicial Administration approved these recommendations and adopted them verbatim.<sup>22</sup>

In 1946 at the annual meeting of the American Bar Association held in Atlantic City, the Section of Judicial Administration conducted a symposium on "The Right of a Judge to Comment on the Evidence in his Charge to the Jury," and passed a series of resolutions similar in tenor to those adopted in 1938.<sup>23</sup> In 1950, a Committee of the Section of Judicial Administration, of which this writer had the honor of being Chairman, submitted a report on the subject of instructions to jurors, and recommended that active efforts be made to achieve the standards previously adopted by the American Bar Association. This report was approved at the Annual Meeting of the Section.

The leadership of the American Bar Association in this matter has not proved as productive of results as had been hoped, although some advances have been made. Elsewhere, active endeavors are in progress to further similar objectives. California, Michigan and Wisconsin have restored this authority to their trial judges, although the writer is informed that it has not as yet been widely used in those

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<sup>21</sup>Vanderbilt, *Minimum Standards of Judicial Administration* 538 (1949). The report is set out in full. *Id.* at 536-44.

<sup>22</sup>Vanderbilt, *op. cit. supra* note 15, at 506.

<sup>23</sup>6 F.R.D. 317-39.



states.<sup>24</sup> There has been some agitation in some of the other states to adopt this much needed reform.

The jury system has been the subject of many encomiums. Alexis de Tocqueville, the great French observer of American institutions, made the following challenging comments on this subject over a century ago:<sup>25</sup>

"The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority. . . .

"The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes."

From a practical standpoint trial judges and trial lawyers, who have come in constant contact with trials by jury, have invariably been of the opinion that as a means of administering justice and arriving at just dispositions of both criminal and civil cases, the jury system has been an outstanding success.

A noted English barrister, the Earl of Birkenhead, made the following illuminating remarks concerning his experience with juries:<sup>26</sup>

"I suppose I was employed in litigation for nearly twenty years, and very largely in jury cases. I cannot remember, in the thousands of cases which I suppose I must have argued before juries, more than three in which I was absolutely certain that the juries were completely wrong. And even in these three the value of my judgment is diminished by the fact that I was an advocate."

Sir Patrick Hastings, who in his day attained renown as a trial lawyer, expressed similar views:<sup>27</sup>

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<sup>24</sup>Cal. Pen. Code § 1127. Mich. Ct. Rules 37 § 9. See also a survey conducted by James C. Toomey, Director of State Committees of the Section of Judicial Administration, summarized in Report of Director of State Committees, August 1956.

<sup>25</sup>1 de Tocqueville, *Democracy in America* 283-85 (Reeve transl. rev. ed. 1945).

<sup>26</sup>1 Birkenhead, *Law, Life and Letters* 255 (1927).

<sup>27</sup>Hastings, *Cases in Court* 90.

"An English jury is the foundation stone of English justice. The ordinary jurymen know nothing of Law, and is not very greatly concerned with the stricter rules of evidence, but he possesses a positive genius for arriving at the truth—possibly because no lawyer is ever required to sit upon a jury. After a not inconsiderable experience, I cannot personally remember one single instance in which a jury have been wrong; I have often been annoyed at their verdict, and may have recognized it as one which no lawyer could have given, but on thinking the matter over at a later date, I have invariably come to the conclusion that they were right... [O]f the many hundreds of juries I have faced there is not one that has not left behind a feeling of deep admiration; for that reason alone it would be ungrateful not to pay some slight tribute to their memory."

Judge Chesnut in his 1938 report, to which reference has been made, expressed a similar opinion in a somewhat different form:<sup>28</sup>

"Criticism of juries in federal courts is comparatively rare. There the common law function of the trial judge is firmly established...."

The writer shares these views. It has been his day to day observation in the trial of cases that juries perform their duties seriously and conscientiously as well as intelligently. The composite product of the twelve jurors is generally superior to the average of the twelve. In a vast majority of cases the jury does substantial justice. Contrary to a general impression, that sometimes is found even among members of the bar, juries are not easily influenced or readily swayed by emotion, sympathy, passion or prejudice. Neither are they affected by minor episodes that occasionally occur, or side issues that sometimes arise during a trial. Ordinarily, juries can be trusted to set to one side all irrelevant and inconsequential matters, to focus their attention on the main issues presented for their decision, and to decide them impartially and fairly. This is particularly true in the federal courts, where the judge is in a position in his instructions to the jury to point out the issues of fact and summarize the evidence, thereby directing and concentrating the jury's attention on the precise matters presented for its determination. Juries often show remarkable discernment and an almost occult and uncanny ability to differentiate between numerous issues presented to them, even in complicated cases involving multiple defendants and counts. To be sure, like all other human beings, jurors occasionally err. It has been this writer's observations, however, that the percentage of errors or miscarriages of

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<sup>28</sup>Vanderbilt, *op. cit. supra* note 21, at 537.

justice in jury trials is very small. It is not practicable to say that the percentage of mistakes on the part of juries is any greater than that on the part of judges. In criminal cases such errors when they do occur are likely to be on the side of acquitting the guilty rather than convicting the innocent. The latter result is rare indeed.

Some of the criticisms directed against jury trials are not well founded. They generally emanate from persons who have had little or no practical experience or actual contact with jury trials. Insofar as they are justified, they generally relate to trials in the courts of those states in which juries are bereft of the guidance of the trial judge and are required to embark in a rudderless vessel on an uncharted sea. Such defects can be met by restoring to state judges the power to instruct and advise the jury as at common law.

Although the efficacy of jury trials is recognized as much as ever, nevertheless, there has been a decline in the use of this mode of trial in some places and in certain types of actions. In England trial by jury has been reduced to a minimum in civil cases. Since England has no written constitution, the privilege of trial by jury is not safeguarded as an inviolate right, and its use is subject to the control of the courts. In civil litigation trial by jury regularly prevails in England today only in actions for libel and slander. Other civil suits are tried by the court without a jury. The explanation sometimes advanced for drawing a line of demarcation in this respect between actions for defamation and other civil cases, is that the former relate to reputation, whereas the others affect only money or other property. It must be observed that in England libel and slander are regarded as a much more serious matter than is often true in the United States. It is felt in England that an action affecting one's reputation is of such importance as to warrant trial by jury. On the other hand, in England personal injury suits, which today form the bulk of civil litigation, are invariably tried by the court without a jury. The advantage of this drastic change lies in its increased efficiency by shortening the duration of the trial. In England less than a day is generally consumed by the trial of an average personal injury case. It is obvious what benefit can be derived by this manner of disposing of a crowded docket.

On the other hand, in criminal cases the right to a jury trial is still preserved in England. A few years ago a procedure was introduced, however, whereby a defendant in a criminal case may waive trial by jury and consent to be tried by a magistrate in the police court. This is frequently done, at least in London, where so-called "stipendiary magistrates" are generally men of learning and stature that would qualify them to sit on a higher court.

Some of the provinces in western Canada have in recent years followed the English tendency of doing away with jury trials in civil actions.

In the United States, trial by jury has been preserved to a much greater extent than in the mother country. Here both civil and criminal cases are generally so tried. Ordinarily it is impossible to abolish jury trials except by consent of the parties, in view of the fact that the Constitution of the United States and most state constitutions preserve the right to this mode of trial. Neither the legislative branch of the government, nor the courts under the rule-making power can abrogate or abridge this privilege. Thus, personal injury cases still continue to be tried by juries in most of the states as well as in the federal courts. This is likewise true of criminal cases. There seems to be a feeling at the bar in this country that trial by jury should be preserved. Certain encroachments on this mode of trial have been made, however. There is a class of personal injury actions that are regularly tried in the federal courts without a jury. This group comprises tort actions in which the United States is a defendant, because the Federal Tort Claims Act, by which the United States waived its immunity to suit in respect to tort claims, attached as a condition to the waiver that in such cases the trial should be without a jury.<sup>29</sup> In view of the numerous ramifications of the activities of the federal government, there are many such suits, the great majority of them arising out of accidents involving government vehicles. Thus, in the fiscal year ending June 30, 1958, 1216 cases were filed in the federal courts under the Federal Tort Claims Act.<sup>30</sup> While no doubt a large proportion of them will eventually be disposed of without a trial, those that remain to be tried will be heard without a jury. Experience shows that because of this circumstance a trial under the Federal Tort Claims Act usually takes a much shorter time than is true of private tort cases. There has been no complaint, so far as this writer is aware, against this mode of trial of tort suits against the United States, nor has there been any suggestion that judges are less liberal than jurors, either in passing on the issue of liability, or in ascertaining the amount of damages.

The writer is informed that in Louisiana a practice has arisen, more or less by common consent, to waive jury trials in a great many actions for personal injuries. The explanation of this local usage is

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<sup>29</sup>68 Stat. 589 (1954), 28 U.S.C. § 2402 (Supp. III, 1956).

<sup>30</sup>Report of Administrative Office of the United States Courts pp. I-1 to 18, Sept. 1958.

that under the Louisiana law, appellate courts may pass on the weight of evidence and that, therefore, a judge's decision is subject to a review on the facts as well as on the law. It is said that this practice operates successfully.

In criminal cases, an interesting local practice has grown up in Maryland. For a great many years it has been customary in the city of Baltimore to waive jury trials in criminal cases. The result is that in Baltimore, considerably over 90 per cent of all criminal cases are tried without a jury. To some extent the same practice prevails in the rest of the state, although there the percentage of cases tried by the court alone is somewhat lower.

The practice of waiving jury trials in the federal courts is on the increase in some districts. For example, at one time this writer was temporarily sitting by assignment in the Eastern District of Michigan, and found that in about 60 per cent of the criminal cases that came before him for trial, there was a waiver of a jury and a consent to trial by the court. To take another instance, in the District of Columbia such waivers are not uncommon. Not long ago the writer tried a case of murder in the first degree, in which there were two defendants, both of whom not only waived a jury trial, but even insisted and urged that the court accept the waiver, which the court felt in duty bound to do. Recently there has been a tendency to waive jury trials in criminal cases in which the defendant relies solely on the defense of insanity.

One of the methods recommended for accelerating congested dockets in metropolitan centers is the abolition of jury trials in personal injury actions, which have been clogging the calendars. It has been urged that jury trials constitute a luxury that we must forego in order to manage the mounting volume of tort litigation. One proposal involves a substitution of trial by the court without a jury. In the federal courts and in most states this end can be attained only by a constitutional amendment, or by the consent of the parties in individual cases. Another proposal is more drastic. It has been suggested that an administrative tribunal be created to award damages in automobile accident cases on a compensatory basis, without regard to negligence. Such a scheme would be similar to the method of adjusting compensation in Workmen's Compensation cases. Every motorist then would be required to carry insurance or perhaps contribute to a fund out of which compensation would be paid. The shortcoming of such a plan is that as the award of damages would not be based on negligence but would be more or less automatic, in many cases adequate compensation would not be received for pain and suffering or for the

results of serious permanent injuries. Moreover, to permit administrative bodies forming a part of the executive branch of the government, to pass on personal civil controversies, might well be deemed an encroachment on the tri-partite division of government and an infringement on the jurisdiction of the judicial branch.

One may inquire why lawyers do not waive jury trials if by this means trials can be shortened and cases can be reached for final disposition faster than is true in some metropolitan centers today. It would seem that it should be of interest to counsel representing plaintiffs to do so. The explanation often advanced by lawyers who specialize in practice on the plaintiff's side in personal injury cases is that juries are likely to be less rigid in enforcing the doctrine of contributory negligence than is often true of judges. It is sometimes said that jury trials would be frequently waived and trials by the court alone accepted, if the doctrine of contributory negligence were abolished and the rule of comparative negligence were substituted, particularly in jurisdictions where the judge is clothed with his common law powers.

The doctrine of contributory negligence, if rigidly applied, frequently leads to unjustified results, in that it absolves the defendant from all liability irrespective of the fact that he may have been negligent and even grossly negligent. Some amelioration in the hardships of this rule has been introduced by the doctrine of the last clear chance which, however, may on occasion be equally unjust in respect to defendants. Under the last mentioned doctrine a defendant may be held liable irrespective of how negligent the plaintiff may have been, and in what degree he may have contributed to the accident. The doctrine of comparative negligence seems to hold the scales even between the parties. In the federal courts it operates successfully in cases under the Federal Employers' Liability Act and the Jones Act. It has likewise met with considerable success in several of the states. Many far-sighted persons are urging its adoption elsewhere. If accepted it may have a considerable effect on the extent to which resort will continue to be had to jury trials in negligence actions.

Trial by jury has been a magnificent and a cherished institution. What the future holds in store for it is shrouded in mystery. It is indeed within the realm of possibility that those who seek to eliminate it partially in civil cases in order to expedite the disposition of litigation may be successful. Whether this is likely to happen is, however, highly speculative and problematical. In any event, we must strive to restore trial by jury in the state courts to its common law form, in order to enable juries to render the best possible service to the administration of justice.

## THE OBSOLESCEMENT LAW OF LARCENY\*

ARTHUR L. GOODHART†

On frequent occasions in the past this *Review* has urged that the law concerning larceny, larceny by a trick, embezzlement, false pretences, and other forms of dishonesty by which the property belonging to another can be acquired, should be reconsidered, and that a simplified law of theft on the Continental model should be substituted for the forest of provisions in which it is so easy to lose one's way. It is only fair, however, to point out that there are three things which can be said in favor of the present chaos. The first is that it gives the ingenious but dishonest rogue a sporting chance to get away: with any luck he may find a legal loophole through which he can escape. The second is that it gives the teacher of law an excellent means by which to test the memory of his students because a detailed knowledge of the precedents, frequently distinguished although in fact indistinguishable, is essential here. As these cases are based on legal fictions, invented by the judges for the laudable purpose of doing justice when the strict law would lead to an undesirable result, it is hardly surprising that ordinary reasoning is more of a hindrance than a help in trying to understand them. The third argument in favour of the present law is that it has given the critics of the legal profession, from the time of Bentham to the present day, an obvious example to advance in support of their allegation that lawyers are too strongly wedded to the past and are prepared to follow an ancient and outmoded rule merely because it is ancient. These three considerations must, of course, be given full weight when any change in the law is proposed, but whether they furnish a sufficient justification for the existing confusion may, perhaps, be open to doubt.

It is therefore most encouraging, if we may say so with respect, to find that in *Russell v. Smith* [1958] 1 Q.B. 27, 31, Lord Goddard C. J.

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\*EDITOR'S NOTE: This short article is reprinted from the April 1958 issue of The Law Quarterly Review, in which it originally appeared as an unsigned Note. In writing to the Editor, Professor Goodhart of Oxford, for permission to reprint, a request was included to use the name of the author. In kindly granting the permission, Professor Goodhart said that he wrote this note, as well as all the other unsigned notes in the L.Q.R. The April issue contained twenty of these notes, with a subject matter that apparently covers the complete range of English law.

†Professor Emeritus and Master of University College, Oxford, 1951-date; Editor, Law Quarterly Review; K.B.E., Q.C.; Professor of Jurisprudence, Oxford, 1931-51.

has quoted with approval the following "strong words" from Mr. Rupert Cross's note ((1956) 72 L.Q.R. 183) on *Moynes v. Cooper* [1956] 1 Q.B. 439: "[Such cases] are a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties." The Lord Chief Justice concluded that "it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up."

The instant case contains some pretty legal subtleties. An information was preferred against the respondent S., a lorry driver, alleging that he had stolen certain sacks of meal, the property of C., Ltd. When S. collected a ton of feeding stuffs from C., Ltd., to deliver to J., Ltd., an extra batch of eight sacks was loaded on his lorry in error. S. did not know of this mistake until he discovered it when unloading at the premises of J., Ltd., and he then decided to keep the eight extra sacks for himself. The justices dismissed the information as they were of the opinion that the "taking" of the eight additional sacks took place at the time of the loading, and that at that time S. did not have the intent permanently to deprive the owner thereof. On ordinary grounds of common sense there is obviously much to be said in favour of this conclusion, as it seems to be impossible to distinguish the eight excess sacks from the rest of the load. Which eight sacks did S. not intend to receive at the time of the loading? Were they the last eight sacks which were loaded, or were they the eight sacks which he finally retained when he found that an excess number had been loaded? Similarly, which eight sacks did the C. Co. not intend to load on the lorry? On appeal the Divisional Court held that there had been a taking and that the case must go back to the magistrates with a direction to convict. Lord Goddard C.J. analysed in his judgment the various precedent cases and reached the conclusion that the decision in *R. v. Hudson* [1943] K.B. 456 must be followed. He held that the respondent did not know what he had in the lorry until he found that he had eight sacks too many. "He was never intended to have eight sacks too many and he never intended to take eight sacks too many" (p. 34). It would obviously be possible to argue with equal force that the respondent intended to receive all the sacks that were loaded on his lorry even though an error in the number of sacks was made. The Lord Chief Justice continued: "I do not think that a man can take into his possession, or come into possession of, a thing of which he has no knowledge . . . . If the respondent did not know that the goods were there, how can he be said to be in possession of them?"



On the other hand, in *Hibbert v. McKiernan* [1948] 2 K.B. 142 it was held that the members of a golf club have possession of balls which have been lost by individual players even though the members can have had no knowledge of "the position or number of balls that might be lying on their property" (Lord Goddard C.J., p. 150). In the present case the respondent had no knowledge of the number of sacks but it seems reasonable to suggest that he intended to exercise control over all the sacks on his lorry. Justice was obviously done in both cases, but it is not markedly easy to reconcile them. They both, however, strongly support the Lord Chief Justice's plea that the law should be "somewhat simplified." One way by which this could be accomplished in large part would be to get rid of the whole doctrine of possession as it relates to the law of theft.

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The materials published herein state the views of the writers. THE REVIEW takes no responsibility for any statement made, and publication does not imply agreement with the views expressed.

## LAW SCHOOL NOTES

*Tucker Lectures.* Whitney North Seymour of the New York bar will deliver the Tucker Lectures on May 1 and 2. His subject will be "Horizons for the Young Lawyer." The American Bar Association has nominated Mr. Seymour for the office of President-Elect for 1959-60 and President for 1960-61. Mr. Seymour was recently elected Chairman of the Board of the Carnegie Endowment for International Peace.

*Law Review.* The following board of editors has been named for Volume XVI, Number 2: Owen A. Neff, Editor; John R. Alford, Joseph C. Knakal, Jr., and S. James Thompson, Jr., Associate Editors.

An index for the first fifteen volumes has been prepared and will be published this spring.

*Faculty.* Associate Professor Wilfred J. Ritz has been promoted to full Professor, effective September 1. During the fall semester Professor Charles R. McDowell served as Visiting Professor at the University of Virginia, where he taught Corporations; he continued to teach Bills and Notes at Washington and Lee. Professor McDowell was awarded a Certificate of Service by the Staples Chapter of Phi Alpha Delta; this certificate is awarded for outstanding service to the legal profession, the law school, and the student body. Professor Charles P. Light, Jr., has been named a member of the Special Committee on Military Justice of the American Bar Association.

*Moot Court.* The team representing Washington and Lee qualified for the final rounds of the Ninth National Moot Court Competition by winning second place in the Regional Round held at Chapel Hill, N. C. Washington and Lee lost to the team from Marquette University Law School in New York. Team members were Richard Anderson, Walter Burton, and Charles Swope. Robert E. Stroud served as Chairman of the Student Bar Association Committee on Moot Court, which handles the competition at the Law School.

*Student Bar Association.* The officers elected for the Spring Semester are: James W. Stump, President; William H. Abeloff, Vice President; Frank W. Ling, Secretary; and David E. Dunlap, Treasurer.

*Omicron Delta Kappa.* Ross L. Malone, President of the American Bar Association, and an alumnus of the Washington and Lee Law School addressed the annual assembly of ODK. Four law students were tapped: John R. Alford, Owen A. Neff, Robert E. Stroud, and James W. Stump.

## CASE COMMENTS

SPONTANEOUS EXCLAMATION IMPROPERLY ADMITTED  
TO PROVE AGENCY

When a statement is uttered out-of-court by a person not under oath and not subject to cross-examination, the hearsay rule of evidence forbids the use of such an extrajudicial statement to prove the truth of the matter contained therein.<sup>1</sup> "Hearsay is excluded because of potential infirmities with respect to the observation, memory, narration, and veracity of him who utters the offered words when not under oath and subject to cross-examination."<sup>2</sup>

The effect of the various exceptions<sup>3</sup> to the hearsay rule is to permit out-of-court statements to be repeated in court by either the person who heard the utterance or by the declarant himself and to be admitted in evidence to prove the truth of the matter stated, irrespective of the fact that the speaker was neither under oath nor subject to cross-examination when the statement was uttered. For instance, if immediately after an automobile accident involving A and B, A were to tell B that "I was in a hurry to get home," this assertion would be hearsay when repeated by B in court, because A, the declarant, was not under oath and not subject to cross-examination when he uttered the statement; but it would nevertheless be admissible in evidence against A, in an action for negligence, under the spontaneous exclamation (excited utterance)<sup>4</sup> exception to the hearsay rule.<sup>5</sup> This exception, like all exceptions to the hearsay rule, is based upon two general principles: (1) that some *special necessity* exists for resorting

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<sup>1</sup>5 Wigmore, Evidence § 1361-62 (3d ed. 1940). The word "statement" has been defined as follows: "'Statement' means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated." Uniform Rule of Evidence 62(1) (1953).

<sup>2</sup>Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 541 (1946).

<sup>3</sup>For an enumeration of thirty-one exceptions to the hearsay rule, see the Uniform Rule of Evidence 63 (1953).

<sup>4</sup>For purposes of this comment, the terms "spontaneous exclamation" and "excited utterance" will be used interchangeably. The writer prefers not to use the term "spontaneous declaration" because of its variegated applications. For example, one writer divides his discussion of "spontaneous declarations" into six separate topics: (1) declarations of bodily condition, (2) declarations of mental state, (3) excited utterances, (4) declarations of present sense impressions, (5) *res gestae*, and (6) self-serving declarations. McCormick, Evidence 561 (1954).

<sup>5</sup>The same statement would also be admissible in evidence against the declarant under the admission exception to the hearsay rule. See note 22 *infra* and accompanying text.

to the hearsay statement,<sup>6</sup> and (2) that the statement must have been uttered under circumstances calculated to give some *special trustworthiness* to it, thereby justifying its immunity from the usual test of cross-examination.<sup>7</sup>

Considering these two principles with reference to the stated hypothetical, there is a "special necessity" for admission of the statement because the declarant of the hearsay utterance, later a party to an action for negligence, would not want to testify on the witness stand that he had been in a hurry to get home. In considering the principle of special necessity as applied to the spontaneous exclamation exception, Wigmore observes: "The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it."<sup>8</sup> A more comprehensive analysis of the stated hypothetical is necessary to illustrate the second principle of "special trustworthiness" as applicable to the spontaneous exclamation exception: (1) the automobile collision created a startling occurrence; (2) the declarant's statement that he was in a hurry to get home was prompted by the exciting occurrence and was dominated by the nervous excitement therefrom, before the speaker had time to reflect; and (3) the statement that he was driving hurriedly threw light upon the collision. These three circumstances are the bases of the spontaneous exclamation exception to the hearsay rule.<sup>9</sup> The factor of special reliability is thought to be furnished by the excitement that suspends the powers of reflection and fabrication.<sup>10</sup> Thus, in effect, the excitement of the moment adds an in-

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<sup>5</sup>Wigmore, Evidence § 1421 (3d ed. 1940).

<sup>7</sup>Id. § 1422.

<sup>8</sup>6 id. § 1748.

<sup>9</sup>Wilcox v. Berry, 32 Cal. 2d 189, 184 P.2d 939, 940-41 (1947); Perry v. Haritos, 100 Conn. 476, 124 Atl. 44, 47 (1924); Roushar v. Dixon, 231 Iowa 993, 2 N.W.2d 660, 662 (1942); Sexton v. Balinski, 280 Mich. 28, 273 N.W. 335, 336 (1937); Potter v. Baker, 162 Ohio St. 488, 124 N.E.2d 140, 145 (1955); 6 Wigmore, Evidence § 1750 (3d ed. 1940).

<sup>10</sup>McCormick, Evidence 579 (1954). The following passage has been quoted by the courts [Perry v. Haritos, 100 Conn. 476, 124 Atl. 44, 47 (1924); State v. McLaughlin, 138 La. 958, 70 So. 925, 927 (1916)] as a basis for finding the element of trustworthiness in a spontaneous exclamation: "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as

gradient of trustworthiness to an otherwise inadmissible extrajudicial statement and removes the barrier to its admission in evidence before the jury.<sup>11</sup>

A factual pattern similar to that of the hypothetical was involved in *Murphy Auto Parts Co. v. Ball*.<sup>12</sup> The plaintiff, a minor, was injured when struck by a passenger car owned and operated by the defendant's employee. The plaintiff's mother testified that immediately after the injury and at the scene of the accident the defendant's employee "told me...he had to call on a customer and was in a bit of a hurry to get home."<sup>13</sup> The trial court held that the alleged extrajudicial statement was admissible to show that the employee was in fact engaged in his employer's business at the time of the collision with the minor plaintiff, since such statement had been an excited utterance. The Court of Appeals for the District of Columbia Circuit unanimously affirmed the holding of the trial court.

In the previous analysis of the stated hypothetical it was explained that the extrajudicial statement of anxiety to get home could have been admitted in court under the spontaneous exclamation rule in an action for negligence against the declarant. Moreover, in the principal case had the driver stated immediately after and at the

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lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 6 Wigmore, Evidence § 1747 (3d ed. 1940).

<sup>11</sup>The validity of the spontaneous exclamation exception has been questioned on the grounds that emotion often prevents the perception from being reliable. Marston, *Studies in Testimony*, 15 J. Crim. L., C. & P.S. 5, 8 (1924). The following passage, to be compared with the quotation from Wigmore in note 10 supra, cogently illustrates the psychological attack on the reliability of spontaneous exclamations: "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation. M. Gorphe cites the case of an excited witness to a horrible accident who erroneously declared that the coachman deliberately and vindictively ran down a helpless woman. Fiore tells of an emotionally upset man who testified that hundreds were killed in an accident; that he had seen their heads rolling from their bodies. In reality only one man was killed, and five others injured. Another excited gentleman took a pipe for a pistol. Besides these stories from real life, there are psychological experiments which point to the same conclusion. After a battle in a classroom, prearranged by the experimenter but a surprise to the students, each one was asked to write an account of the incident. The testimony of the most upset students was practically worthless, while those who were only slightly stimulated emotionally scored better than those left cold by the incident." Hutchins and Slesinger, *Some Observations on the Law of Evidence*, 28 Colum. L. Rev. 432, 437 (1928) (footnote references omitted).

<sup>12</sup>249 F.2d 508 (D.C. Cir. 1957).

<sup>13</sup>Id. at 509.

scene of the accident only that he had been in a hurry to get home, such a statement would have been admissible in evidence, under the same exception to the hearsay rule, against the *employer* in an action for negligence—assuming that both the fact of employment and course of employment had been proved by independent evidence. In other words, unlike the vicarious admission rule which will be discussed later, it is immaterial in passing upon the admissibility of spontaneous exclamations that an agency relationship exists between the speaker and a party to the trial.<sup>14</sup>

It is to be emphasized, however, that the purpose for admitting the out-of-court assertion in the principal case (that declarant had to call on a customer and was in a hurry to get home) was to prove the fact of *course of employment*. The action for personal injury was against the declarant's employer and not against the employee; except for the hearsay statement there was no independent evidence to prove that the owner and driver of the car was in the course of his employment at the time of the injury, because the collision took place at 6:30 p.m., one and one-half hours after the regular work day had terminated.

On its face, the principal case appears to be contrary to an overwhelming weight of authority which holds that the out-of-court declaration of an agent is not admissible in court against his employer to prove either the fact of agency or course of employment.<sup>15</sup> But this majority proposition is limited to the vicarious admission exception to the hearsay rule which must be analyzed in terms of the principal case to distinguish it properly from the spontaneous exclamation exception. Under the vicarious admission exception, assuming that *both* the fact of agency and course of employment have been established by independent evidence, extrajudicial admissions of an agent, who is authorized to make statements concerning the

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<sup>14</sup>6 Wigmore, Evidence § 1756(a) (3d ed. 1940). Note, 22 Minn. L. Rev. 391, 405 (1938). See quote from *Tiffany* in note 23 *infra*.

<sup>15</sup>American Nat. Bank v. Bartlett, 40 F.2d 21, 23 (10th Cir. 1930); Commercial Solvents v. Johnson, 235 N.C. 237, 69 S.E.2d 716, 719 (1952); 4 Wigmore, Evidence § 1078 (3d ed. 1940); McCormick, Evidence 519 & n.14 (1954). Restatement (Second), Agency § 285 (1958); 20 Am. Jur. Evidence § 597 (1939). For an exhaustive collection of cases see Annot., 3 A.L.R.2d 602 (1950).

It must be remembered, however, that the majority rule does not preclude an alleged agent from testifying in court to the fact of agency or course of employment because such testimony would not be offered as a vicarious admission. *Shama v. United States*, 94 F.2d 1, 5 (8th Cir. 1938); *Daly v. Williams*, 78 Ariz. 382, 280 P.2d 701, 703-04 (1955); *Wilson v. Savino*, 10 N.J. 11, 89 A.2d 399, 402 (1952); *Midland Credit Co. v. White*, 175 Pa. Super. 314, 104 A.2d 350, 352 (1954); 4 Wigmore, Evidence § 1078 & n.8 (3d ed. 1940); McCormick, Evidence 519 (1954).

subject matter of the utterance, are admissible in evidence against the principal<sup>16</sup> on the theory that the identity of interests between a principal and his agent is a sufficient guarantee of the reliability of such statements as evidence.<sup>17</sup> For example, if A is employed as an agent to make out-of-court settlements of automobile claims against his insurance company and in performance of this employment makes an admission that acknowledges the carelessness of his insured in an automobile accident, it is evident that such an admission was uttered during A's employment and within the scope of his authority. Consequently, A's admission could be used in court as evidence against the insurance company, having satisfied the requirements of the vicarious admission exception. However, the utterance by the defendant's employee in the *Ball* case, that he had to call on a customer and was in a bit of a hurry to get home, would not satisfy the vicarious admission exception for two reasons. Firstly, there was no independent evidence introduced to prove that the employee had any authority whatsoever to call on customers after the termination of the work day; without such evidence the fact of course of employment could not be proved. With this in mind Wigmore explains "that the *fact* of agency [or course of employment] must of course be somehow evidenced *before the alleged agent's declarations* can be received as admissions; and therefore the use of the alleged agent's hearsay assertions that he is agent would for that purpose be inadmissible, as merely begging the very question."<sup>18</sup> Secondly, even assuming that course of employment had been proved by independent evidence, the employee's statement as to his anxiety to get home would not satisfy the prevailing view that for a vicarious admission to be admitted in evidence against the principal, the agent must have had authority to make statements concerning the subject matter of the utterance.<sup>19</sup>

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<sup>16</sup>United States v. United Show Mach. Corp., 89 F. Supp. 349, 352 (D. Mass. 1950); Friedman v. Forest City, 239 Iowa 112, 30 N.W.2d 752, 759 (1948); Sacks v. Martin Equip. Corp., 333 Mass. 274, 130 N.E.2d 547, 550 (1955); Restatement (Second), Agency § 286 (1958). But cf. note 20 infra.

<sup>17</sup>47 Colum. L. Rev. 1227, 1228 (1947). Another basis for reliance on the extrajudicial statements of a "speaking-agent" has been suggested: "Such reports, when of facts within the reporter's knowledge, are likely to have a high degree of trustworthiness as to matters of advantage to the opponent. They are usually the result of careful investigation by a person whose duty demands accurate observation and narration; they are not likely to contain false statements diserving to the master. Thus they stand on the same basis as most other entries in the course of business and duty." Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461, n.4 (1929).

<sup>18</sup>4 Wigmore, Evidence § 1078 (3d ed. 1940). Accord, 2 Jones, Evidence 1748 (1926).

<sup>19</sup>See note 16 supra.



In other words, under the prevailing view, the employee is the agent of the principal only for the purpose of operating the vehicle and not for the purpose of making statements concerning its mode of operation.<sup>20</sup>

From the previous discussion it is evident that the vicarious admission rule and the spontaneous exclamation rule are based upon two distinct and unrelated principles. The vicarious admission exception is derived from the substantive rule of agency that an agent may bind his principal when he has authority to speak, for the utterance becomes that of the principal.<sup>21</sup> Superimposed upon this rule of agency is the admission rule of evidence that a person's own hearsay may be used against him. This exception to the hearsay rule is based upon the theory that a party, having made a statement which by chance operates against his interest at the time of the trial, cannot object to its reception as evidence for the reason that he has the full opportunity to put himself on the stand and explain his former assertion.<sup>22</sup> The spontaneous exclamation exception, on the other hand, is not dependent upon any rule of agency; rather it is purely a rule of evidence and is just as applicable in a proper case to one who was not an agent as to one who was an agent.<sup>23</sup> "The theory is that

<sup>20</sup>Assuming that both the fact of agency and course of employment have been established by independent evidence, there is a minority trend, embodied in the Model Code of Evidence rule 508(a) (1942) and in the Uniform Rule of Evidence 63(9)(a) (1953), which permits extrajudicial statements of an agent, whether authorized or not, to be admitted in evidence against the principal if naturally made in the course of the agency and before the termination thereof. *Silfka v. Johnson*, 161 F.2d 467, 469 (2d Cir. 1947); *Whitaker v. Keogh*, 144 Neb. 790, 14 N.W.2d 596, 600 (1944); 4 Wigmore, Evidence § 1078 (3d ed. 1940); McCormick, Evidence 580 (1954).

<sup>21</sup>Restatement (Second), Agency § 286 (1958).

<sup>22</sup>Wigmore, Evidence § 1048 (3d ed. 1940). A second theory underlying the admission exception is one of estoppel: once a person has said something, he is then estopped to deny, in a subsequent trial, having made his former assertion. 37 Ky. L.J. 417, 421 (1949).

It is necessary to emphasize that the admission exception must be distinguished from the declaration against interest exception to the hearsay rule. The admission exception permits in evidence the out-of-court statement of a party opponent whether or not the utterance was against his interest when made. *Morgan, Admissions as an Exception to the Hearsay Rule*, 30 Yale L.J. 355, 358-59 (1921). For additional distinctions between the two exceptions see 4 Wigmore, Evidence § 1049 (3d ed. 1940).

<sup>23</sup>2 Mecham, Agency § 1793 (1914). For examples of one judge who was particularly mindful of the distinction between vicarious admissions and excited utterances see *Chantry v. Pettit Motor Co.*, 156 S.C. 1, 152 S.E. 753 (1930) (dissenting opinion) and *Snipes v. Augusta-Aiken Ry. & Elec. Corp.*, 151 S.C. 391, 149 S.E. 111 (1929) (dissenting opinion). The following passage from a treatise clearly distinguishes the two rules: "On the one hand, declarations made at the time of the act

by the parties participating therein and part of the *res gestae*—that is, of the surrounding circumstances—are admissible, irrespective of whether the participants are servants of the person sought to be held responsible for the act, and by whomsoever made. On the other hand, the statement of a servant or agent is admissible as an admission, if it is made when he is engaged in some authorized transaction, and it is within the scope of his authority in that transaction to make the statement. To illustrate: In an action against a railway company, by a person injured by a collision, the declaration of the engineer, referring directly to and characterizing or explaining the occurrence, made at the time or immediately afterwards, under its immediate influence, may, under the circumstances of the case, be held part of the *res gestae*, and admissible against the company upon that ground. It might be, however, that some subsequent statement of the engineer as to the cause of the accident, although not part of the *res gestae*, would be evidence against the company as an admission, as, for example, if it happened to be made by him in the course of his duty in making a report of the accident to a superior officer. In the one case the declaration of the engineer is admissible as a circumstantial fact, as part of the *res gestae*, because it is the spontaneous utterance of a participant in the event. In the other case his statement is admissible against the company as an admission, because it is made at a time and under circumstances when the engineer has authority to make it. If the statement is not admissible, either as a declaration forming part of the *res gestae*, or as an admission, it cannot be received." Tiffany, Agency § 106 (1924) (footnote references omitted).

The above passage also illustrates the commingling of the phrases "spontaneous exclamation" and "*res gestae*." Whenever an utterance qualifies as a spontaneous exclamation, it is admissible in evidence under that exception to the hearsay rule; and any reference to the term "*res gestae*" is not only confusing but superfluous. As Wigmore explains: "The phrase '*res gestae*' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in terms of that principle. . . . It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." 6 Wigmore, Evidence § 1767 (3d ed. 1940). For a sampling of courts confusing the spontaneous exclamation rule by referring to it as "part of the *res gestae*," see Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99, 105 (1886) (statement by engineer between ten and thirty minutes after a railway accident held not admissible as part of *res gestae*); Foster v. Pestana, 77 Cal. App. 2d 885, 177 P.2d 54, 57 (1947) (spontaneous exclamation of foreman, made immediately after accident, was admissible under *res gestae* rule against employer and his foreman); Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N.W.2d 643, 647 (1953) (statement by driver immediately after an accident that he was driving too fast held admissible as part of *res gestae*); Beaulé v. Weeks, 95 N.H. 453, 66 A.2d 148, 152 (1953) (statement by truck driver one-half hour after accident not admissible as part of *res gestae*); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, 27 (1950) (statement made some time after accident held not admissible as part of *res gestae*). It may be noted that in each of the cases cited admissibility of the statement turned upon its proximity to the occurrence which provoked it. Consequently, the courts were in reality analyzing the spontaneous exclamation exception under the label of "*res gestae*." Morgan observes: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.' It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the troublesome exertion of exact analysis and precise thinking." Morgan, A Suggested Classification of Utterances Admissible as *Res Gestae*, 31 Yale L.J. 229 (1922).

the spontaneous utterances of one who speaks under the excitement of the moment and before he has had time to deliberate—to concoct a self favoring story—are likely to be true.”<sup>24</sup>

With the above distinction between the two rules clearly in mind, the *Ball* case analyzed the hearsay statement, that the employee had to call on a customer and was in a hurry to get home, with reference to the three usual requirements of the excited utterance exception: (1) an exciting event; (2) an utterance prompted by the exciting occurrence without time to reflect; and (3) an illumination of the exciting event by the utterance.<sup>25</sup> The court encountered difficulty with the third requirement because, needless to say, the fact that the employee previously had to call on a customer no more elucidated the automobile collision than if the employee had stated that he had been to the movies and was in a hurry to get home. To overcome this requirement of “illumination,” the court relied heavily upon the reasoning of Wigmore, to the effect that the third element is a spurious one,<sup>26</sup> and concluded: “The test for receiving the utterance, therefore, should be whether it meets the first two requirements of a spontaneous declaration or excited utterance.... In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event.”<sup>27</sup> The decision in the principal case, then, adopted the liberal view advocated by Wigmore that the essence of the spontaneous exclamation exception is, as its name implies, the element of *spontaneity*.<sup>28</sup> In emphasizing this element, the court decided that even though the utterance went beyond a description of the exciting event and dealt with past facts, this is merely one of the factors to be considered by the trial judge in evaluation of whether the statement was spontaneous. In effect, the court embraced the principle that if the statement is determined by the trial court to be spontaneous and relevant, then it is admissible in evidence, irrespective of its subject matter.<sup>29</sup>

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<sup>24</sup>2 Mechem, Agency § 1793 (1914).

<sup>25</sup>See note 9 *supra*.

<sup>26</sup>249 F.2d at 511. The court referred to Wigmore's belief that the requirement that the utterance illuminate the occurrence preceding it has been mistakenly borrowed from the verbal act doctrine. 6 Wigmore, Evidence §§ 1752, 1754 (3d ed. 1940). Unfortunately, however, the court failed to realize that there are situations where the requirement becomes a real one, even under the analysis of Wigmore. See especially the text accompanying notes 30, 31, 32 and 33 *infra*.

<sup>27</sup>249 F.2d at 511.

<sup>28</sup>6 Wigmore, Evidence § 1749 (3d ed. 1940).

<sup>29</sup>Morgan appears to embrace the same principle: “If spontaneity of itself is

It is submitted that the *Ball* case has extended the application of the spontaneous exclamation rule beyond the permissible bounds advocated by Wigmore and beyond the scope of sound reasoning. While it is true that Wigmore states that the third requirement, that the statement elucidate the exciting event, "is perhaps a cautionary rather than a logically necessary restriction,"<sup>30</sup> he later qualifies himself with the following positive statement: "There is, however, one aspect in which the limitation becomes a real one; for the matter to be 'elucidated' is, by hypothesis, *the occurrence or act which has led to the utterance*, and not some distinctly separate and prior matter."<sup>31</sup> It is manifest that the part of the utterance of the principal case, that the employee had to call on a customer, was a reference to something not directly connected with the accident at all. The fact that the driver was returning from a "call" does not in any way emanate from or explain the accident but is rather a reflective narrative of a past event. Surely no one would contend, if the employee had stated in the principal case that he had been to the movies and was in a hurry to get home, that the statement relative to the movies would have had any connection whatsoever with the accident. In like manner, the statement which is claimed to prove course of employment relates to a wholly different and distinct transaction from the accident itself.<sup>32</sup> Thus, under Wigmore's analysis of the spontaneous exclamation rule, the statement could not, by hypothesis, be admitted in evidence irrespective of the fact that it was a spontaneous utterance prompted by an exciting event.<sup>33</sup> In discussing the spontaneous

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to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties." Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 239 (1922).

<sup>30</sup>6 Wigmore, Evidence § 1750(c) (3d ed. 1940).

<sup>31</sup>Id. § 1754.

<sup>32</sup>The following cases have made a similar analysis and have held that such an utterance as that of the principal case was not admissible to prove agency or course of employment: Cook v. Hall, 308 Ky. 500, 214 S.W.2d 1017, 1018 (1948); Wenell v. Shapiro, 194 Minn. 368, 260 N.W. 503, 506 (1935); Shepson v. Alhambra Lounge & Restaurant, Inc., 110 N.E.2d 619, 621 (Ohio App. 1952); Deater v. Penn. Mach. Co., 311 Pa. 291, 166 Atl. 846, 847 (1933); Lewis v. J. P. Word Transfer Co., 119 S.W.2d 106, 108 (Tex. Civ. App. 1938). The analysis in the cited cases is weakened, however, by the insistence of the courts on commingling the terms "spontaneous exclamations" and "res gestae." See the comments following the quotation from Tiffany in note 23 supra.

<sup>33</sup>Wigmore offers the following example which is believed to be an excellent parallel to the utterance of the principal case: "Suppose, for example, an injured passenger in a railway collision, thinking of his family's condition, exclaims, 'I hope that my insurance-premium, which I mailed yesterday, has reached the

exclamation rule Wigmore makes the following observation which is extremely significant when read in light of the principal case: "To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle; and this has been the result."<sup>34</sup>

Although the spontaneous exclamation rule has in many instances provided a reliable basis for the introduction of hearsay evidence before the jury, the rule itself presupposes a spontaneous utterance prompted by and related to an exciting event which stills the powers of reflection and fabrication. When the courts use this rule as a conduit to introduce in evidence before the jury extrajudicial statements which are distinct, separate, and unrelated to the occurrence which provoked them, the reason for the rule disappears.

OWEN A. NEFF

#### MULTIPLE PROSECUTIONS, COLLATERAL ESTOPPEL AND THE CONSTITUTION

William Hoag has been a party *in forma pauperis* before the Appellate Division of the Superior Court of New Jersey, the Supreme Court of that state and the United States Supreme Court.<sup>1</sup> Although evoking the sympathy of six members of the enumerated courts in his quest for freedom, Hoag's conviction has not been reversed. The facts are as follows: Three men, including the defendant, allegedly robbed five persons at gun point in a Fairview, New Jersey, bar. After the apprehension of Hoag, three indictments were returned by the grand jury, each charging him with the robbery of a different victim. The remaining two victims were not named in the indictments. Alibi was the only defense interposed. Yager, one of the victims, who was not named in any of the three original indictments, was the only witness to give positive identification of the defendant. After a finding of not guilty on the first three indictments, the defendant

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company,' referring to premium-money alleged by the insurance company not to have been received. Such an utterance would by the present spurious limitation clearly be inadmissible. On principle, however, it would seem also inadmissible under the legitimate principles of the Exception . . ." 6 Wigmore, Evidence § 1754 (3d ed. 1940).

<sup>34</sup>Id. § 1757(1).

<sup>1</sup>State v. Hoag, 35 N.J. Super. 555, 114 A.2d 573 (App. Div. 1955), *aff'd*, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, Hoag v. New Jersey, 356 U.S. 464 (1958).

was then indicted for the robbery of Yager. Again the defense of alibi was offered. This time a verdict of guilty resulted.

The first issue presented in the New Jersey state courts by these facts was that of former or double jeopardy under the New Jersey Constitution.<sup>2</sup> To sustain a plea on this ground the successive offenses charged must be the same. In denying the defendant's plea of former jeopardy, the trial court, the intermediate appellate court, and a majority of the Supreme Court of New Jersey agreed that it was not former jeopardy to try the defendant for robbing Yager after being formerly acquitted of robbing three other persons, even though each robbery took place on the same occasion. The robbery of each person was held to be a separate offense, and a separate prosecution for each was held not to violate the double jeopardy clause of the New Jersey Constitution.<sup>3</sup>

The constitutional issue upon which certiorari was granted by the United States Supreme Court in *Hoag v. New Jersey*<sup>4</sup> was whether fundamental fairness implicit in due process was violated: (1) by the prosecution of defendant in two actions for multiple offenses when the offenses charged arose out of the same occurrence and could easily have been tried in one proceeding, and (2) by the relitigation of the fact issue of the defendant's identity as raised by his alibi defense.<sup>5</sup>

The first due process contention is whether the successive prosecutions deny the defendant the fundamental procedural fairness required by fourteenth amendment due process. "As in all cases involving what is or is not due process . . . no hard and fast rule can be laid

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<sup>2</sup>"No person shall, after acquittal, be tried for the same offense." N.J. Const. art. I, para. 11. The double jeopardy clause of the United States Constitution, contained in the fifth amendment, does not apply to the states. *Brock v. North Carolina*, 344 U.S. 424, 426 (1953); *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>3</sup>For discussions of the *Hoag* case on the issue as to whether the accused was twice put in jeopardy by being tried in separate proceedings for robberies of different persons, committed at the same time and in the same place, see Note, 25 *Fordham L. Rev.* 531 (1956); Comment, 14 *Wash. & Lee L. Rev.* 80 (1957).

It is generally held that a plea of double jeopardy requires that the victim of the crime charged in each prosecution be the same person. *People v. Lagomarsino*, 97 Cal. App. 2d 92, 217 P.2d 124, 128 (1950); *In re Allison*, 13 Colo. 525, 22 Pac. 820, 822 (1889); *Blitch v. Buchanan*, 100 Fla. 1242, 132 So. 474, 475 (1931); *State v. Taylor*, 138 Kan. 407, 26 P.2d 598, 602 (1933); *Keeton v. Commonwealth*, 92 Ky. 522, 18 S.W. 359, 360 (1892); *State v. Roberts*, 170 La. 727, 129 So. 144, 145 (1930); *Johns v. State*, 130 Miss. 803, 95 So. 84, 85 (1923); *People v. Rogers*, 102 Misc. 437, 170 N.Y. Supp. 86, 89 (Sup. Ct. 1918), *aff'd*, 184 App. Div. 461, 171 N.Y. Supp. 451, 452, *aff'd*, 226 N.Y. 671, 123 N.E. 882 (1919); *Orcutt v. State*, 52 Okla. Crim. 217, 3 P.2d 912, 915 (1931); *Alsup v. State*, 120 Tex. Crim. 310, 49 S.W.2d 749, 751 (1933); 1 *Anderson*, *Wharton's Criminal Law and Procedure* § 143 (1957).

<sup>4</sup>356 U.S. 464 (1958).

<sup>5</sup>*Id.* at 470.

down. The pattern of due process is picked out in the facts and circumstances of each case."<sup>6</sup> Mr. Justice Harlan, writing the majority opinion in the principal case, arrived at the conclusion that fundamental fairness had not been abridged.<sup>7</sup> Merely because the robberies which the defendant is alleged to have committed could have been tried together but instead were tried in two separate proceedings does not "subject him to a . . . hardship so acute and shocking that our polity will not endure it."<sup>8</sup> Unless it can be said that it is unfair and oppressive to one who has committed several offenses for him to be tried for these separate offenses in separate trials, a finding that New Jersey has denied him due process of law would not be warranted.

The second issue reviewed by the Supreme Court is that of collateral estoppel: "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . ."<sup>9</sup> Hoag contended that collateral estoppel should have been applied in the second trial as to the issue of alibi and because it was not applied, due process of law had been denied to him. The Supreme Court of New Jersey refused to invoke the doctrine of collateral estoppel, stating that the facts on which the defense of alibi was based were not necessarily resolved by the first jury's general verdict of not guilty. "There is nothing to show that the jury did not acquit the defendant on some other ground or because of a general insufficiency in the State's proof [citations omitted]. Obviously, the trial of the first three indictments involved several questions, not just the defendant's identity, and there is no way of knowing upon which question the jury's verdict turned."<sup>10</sup>

Mr. Justice Harlan, writing the majority opinion, expressed doubt

<sup>6</sup>Brock v. North Carolina, 344 U.S. 424, 427 (1953).

<sup>7</sup>356 U.S. at 468.

<sup>8</sup>Palko v. Connecticut, 302 U.S. 319, 328 (1937).

<sup>9</sup>Restatement, Judgments § 68(1) (1942). Subsection (2) of this section states that "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

"A victim of varying terminology, the concept has been applied under such aliases as 'estoppel by record,' [United States v. Accardo, 113 F. Supp. 783, 786 (D.N.J. 1953)] 'estoppel by findings,' [Turner v. Bragg, 117 Vt. 9, 82 A.2d 511 (1951)] 'estoppel by verdict,' [Goodman v. McLennan, 334 Ill. App. 405, 429, 80 N.E.2d 396, 406 (1948)] and 'estoppel by judgment,' [Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)] among others." Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954). Millar, The Historical Relation of Estoppel by Record to Res Judicata, 35 Ill. L. Rev. 41 (1940).

<sup>10</sup>State v. Hoag, 21 N.J. 496, 122 A.2d 628, 632 (1956).

whether collateral estoppel could be regarded as within the ambit of due process. However, he refused to discuss the matter on the ground that the Supreme Court's corrective power over state court decisions did not extend far enough to allow a different conclusion as to the basis for the jury's decision than that reached by the New Jersey courts.

It appears that Justice Harlan reached the correct result in the principal case. That is, the relitigation of the issue of alibi in New Jersey did not deny the defendant due process of law. It is submitted, however, that the reasoning employed in reaching this result is fallacious. Quoting with approval Justice Frankfurter's opinion in *Watts v. Indiana*,<sup>11</sup> Justice Harlan states: "'On review here of State convictions, all those matters which are usually termed issues of fact are for the conclusive determination of the State Courts and are not open for reconsideration by this Court.'"<sup>12</sup> By this passage Justice Harlan implied that the Supreme Court of New Jersey determined as a question of fact that the basis of the jury's verdict was open to conjecture. This, it is submitted, is incorrect. In order for collateral estoppel to apply, "a question of fact essential to the judgment" must have been litigated and decided of necessity in a prior proceeding.<sup>13</sup>

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<sup>11</sup>338 U.S. 49 (1949).

<sup>12</sup>356 U.S. at 471.

<sup>13</sup>"The prior judgment is conclusive only as to facts which have such relation to the issue that their determination was necessary to the decision of the issue." *Karameros v. Luther*, 279 N.Y. 87, 91 (1938). *Collens v. Loisel*, 262 U.S. 426, 430 (1923); *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876); *State v. Coblentz*, 168 Md. 159, 180 Atl. 266, 268 (1935); *Griffen v. Keese*, 187 N.Y. 454, 464 (1907); *State v. Barton*, 5 Wash. 2d 234, 105 P.2d 63, 67 (1940).

There is considerable authority for this interpretation. *United States v. Halbrook*, 36 F. Supp. 345, 349 (E.D. Mo. 1941); *People v. Cygan*, 229 Mich. 172, 200 N.W. 967, 968 (1924); *People v. Rogers*, 102 Misc. 437, 170 N.Y. Supp. 86 (Sup. Ct.), aff'd, 184 App. Div. 461, 171 N.Y. Supp. 451, aff'd, 226 N.Y. 671, 123 N.E. 882 (1919); *Commonwealth v. Greevy*, 75 Pa. Super. 116, rev'd, 271 Pa. 95, 114 Atl. 511, 513, cert. denied, 257 U.S. 659 (1922); *State v. Erwin*, 101 Utah 365, 120 P.2d 285, 312 (1941); *State v. Barton*, 5 Wash. 2d 234, 105 P.2d 63, 67 (1940).

Cases holding contra to this view are *Sealfon v. United States*, 332 U.S. 575, 580 (1948); *Coffey v. United States*, 116 U.S. 436, 444 (1885); *United States v. De Angelo*, 138 F.2d 466, 469 (3d Cir. 1943); *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573, 581 (1941); *State v. Meek*, 112 Iowa 338, 84 N.W. 3, 6 (1900); *People v. Grezesczak*, 77 Misc. 202, 137 N.Y. Supp. 538, 541 (Nassau County Ct. 1912).

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *Brown v. New Jersey*, 175 U.S. 172, 175 (1899).

"The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State. The general question, therefore, is,



When the issues presented to the jury are known and the verdict of that jury is known, the determination of what was necessarily decided by that verdict must be arrived at as a matter of law, in this case as a matter of New Jersey law. It was decided as a matter of New Jersey law that it was impossible to determine with certainty which issues of fact were decided by the former general verdict of acquittal.

A federal constitutional question was also presented to the United States Supreme Court, that is, whether the New Jersey law, as determined by the New Jersey court, violates due process guaranteed by the fourteenth amendment.<sup>14</sup> Justice Harlan concluded that the New Jersey Supreme Court had not exceeded constitutionally permissible bounds in determining "that the jury might have acquitted petitioner at the earlier trial because it did not believe that the victims of the robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of 'identity'."<sup>15</sup> This conclusion, though, should have been based on acceptance of a constitutionally valid New Jersey rule of law rather than on a constitutionally acceptable interpretation of facts.

A wholly different conclusion is reached by Mr. Chief Justice Warren as to the claim that defendant had been denied due process of law by requiring him to litigate a second time the issue of alibi. The Chief Justice states: "In my view the issue posed here is not a 'fact issue' at all. The facts are clear and undisputed. The problem is to judge their legal significance."<sup>16</sup> The Chief Justice's conclusion that the New Jersey rule is unconstitutional under the fourteenth amendment seems necessarily to be based on the premise that a large part of the double jeopardy clause of the fifth amendment is incorporated into the fourteenth amendment. He says:

"Few would dispute that after the first jury had acquitted petitioner of robbing the first three victims, New Jersey could not have retried petitioner on the identical charge of robbing

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whether such a law violates the Fourteenth Amendment . . . by depriving persons of their life, liberty or property without due process of law." *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908). See note 14 *infra*.

<sup>14</sup>"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject . . . is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State . . . The only question, therefore, is, as we have stated, whether . . . [that construction] under the circumstances amounted to a violation by the State of the Fourteenth Amendment . . ." *West v. Louisiana*, 194 U.S. 258, 261-62 (1903).

<sup>15</sup>356 U.S. at 472.

<sup>16</sup>*Id.* at 475.

these same three persons. After a jury of 12 had heard the conflicting testimony of the five victims on the issue of the robber's identity and concluded that at least a reasonable doubt existed as to whether petitioner was one of the robbers, the same evidence could not be presented to 12 new jurors in the hope that they would come to a different conclusion.

\*\*\*The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries with a man's innocence or guilt at stake."<sup>17</sup>

With double jeopardy brought under the fourteenth amendment, the reach is not so far to encompass aspects of collateral estoppel as well. The Chief Justice's view then is that since the only *contested* issue in the *Hoag* case was based on alibi; an acquittal in the case as a matter of constitutional law, must have been based on a failure of the state to prove the defendant was present at the scene of the crime. This issue cannot under the double jeopardy clause, incorporated into the fourteenth amendment, be litigated in any other criminal proceeding.

It is doubtful whether former jeopardy is such a fundamental concept as to be "of the very essence of a scheme of ordered liberty"<sup>18</sup> and thus within the purview of fourteenth amendment due process.<sup>19</sup> Even if former jeopardy were such a fundamental concept, the basis for such a holding clearly could not be applied to hold collateral estoppel such a fundamental concept. While former jeopardy has its roots deep in our common law system, collateral estoppel has for its basis mere policy considerations.<sup>20</sup> When such matters as the right to trial by jury,<sup>21</sup> immunity from prosecution except as the result of an indictment,<sup>22</sup> and immunity from compulsory self-incrimination<sup>23</sup> have been determined not to be such fundamental principles

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<sup>17</sup>*Ibid.* Justice Douglas, writing a separate dissent in the principal case, contends that the defendant should not be triable a second time. He states: "Since the petitioner was placed in jeopardy once and found not to have been present or a participant; he should be protected from further prosecution for a crime growing out of the identical facts and occurring at the same time." *Id.* at 479.

<sup>18</sup>*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>19</sup>*Brock v. North Carolina*, 344 U.S. 424 (1953); *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>20</sup>See *Polasky*, *supra* note 9, at 219. "The right to assert the claim of former jeopardy is guaranteed by the constitution [New York]. . . *Res Judicata*, however, does not rest upon any constitutional provision. It is a 'rule of evidence. . . .' " *N.Y.L.J.* Dec. 18, 19, and 20, 1939, quoted in *United States v. Carlisi*, 32 F. Supp. 479, 482 (E.D.N.Y. 1940).

<sup>21</sup>*Maxwell v. Dow*, 176 U.S. 581 (1900).

<sup>22</sup>*Hurtado v. California*, 110 U.S. 516 (1884).

<sup>23</sup>*Twining v. New Jersey*, 211 U.S. 78 (1908).

of liberty and justice as to be implicit in the concept of ordered liberty, collateral estoppel can hardly be said to be such a fundamental principle. "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]."<sup>24</sup>

DONALD J. CURRIE

### FEDERAL ASSIMILATIVE CRIMES ACT: HOW MUCH STATE LAW?

The Assimilative Crimes Act, first enacted in 1825 and periodically re-enacted thereafter,<sup>1</sup> supplements the specific criminal laws passed by Congress for places within the borders of a state but under the exclusive or concurrent jurisdiction of the United States; the 1948 Act<sup>2</sup> adopts as federal law the criminal law of the state or territory in

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<sup>1</sup>*Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>2</sup>4 Stat. 115 (1825), 14 Stat. 13 (1866), 30 Stat. 717 (1898), 35 Stat. 1145 (1909), 48 Stat. 152 (1933), 49 Stat. 394 (1935), 54 Stat. 234 (1940), 62 Stat. 686 (1948). Congress has employed three methods of adopting the criminal law of the states as federal criminal law for the federal enclaves. The simplest is the adoption of state laws existing on the date of the enactment, allowing no subsequent changes or repeals of state law to be effective in the federal enclaves. This method, used from 1866 through 1933, was upheld when challenged as an unconstitutional delegation of Congressional power to the states in *Franklin v. United States*, 216 U.S. 559 (1910). The acts in force from 1933 through 1948, and apparently the one in force from 1825 through 1866, adopted the state criminal laws existing at the date of enactment of the federal statute for such period of time as the state laws remained in force. This method raises the question of the constitutionality of delegating to the states the power to repeal federal laws, a question which does not appear to have been litigated. The present statute adopts the state law in force at the time of the alleged offense, thus giving effect to all repeals, additions, and amendments enacted by the state legislature, and was upheld in *United States v. Sharpnack*, 355 U.S. 286 (1957).

<sup>3</sup>62 Stat. 686 (1948), 18 U.S.C. § 13 (1952) provides: "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." Note that the Act provides that it is applicable in the "places now existing or hereafter reserved or acquired as provided in section 7 of this title." Although § 7 defines the total special maritime and territorial jurisdiction of the United States, the Act appears to be applicable principally in the areas defined by § 7(3): "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." However, *United States v. Gill*, 204 F.2d 740 (7th Cir. 1953), cert. denied, 346

which a federal enclave is located. In a recent case, *Kay v. United States*,<sup>3</sup> the Court of Appeals for the Fourth Circuit upheld a conviction under the Assimilative Crimes Act of 1948 by a federal district court of a driver charged with driving on a federal parkway in Virginia while under the influence of intoxicants. The court held that the 1948 Act made applicable, first, the Virginia statute which prohibits one from driving a vehicle while under the influence of alcohol,<sup>4</sup> and, secondly, the Virginia statute which prescribes penalties for the offense.<sup>5</sup> The first statute includes provisions for (a) a chemical analysis of a blood sample taken at the request of the accused in order to ascertain the extent of intoxication,<sup>6</sup> (b) receipt in evidence of a certificate

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U.S. 825 (1953), extended the Act at least to § 7(2): "Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line." The defendant was convicted of the specific federal crime of assault with intent to commit a felony—sodomy. The assault occurred on Lake Michigan aboard a vessel licensed under the laws of the United States. Since the felony intended must be a federal felony, *Jerome v. United States*, 318 U.S. 101 (1943), and since there was no specific federal crime of sodomy, the court found that the state felony of sodomy was an assimilated federal crime, although the offense did not occur within a "place" described in § 7(3).

The areas within § 7(3) are extensive: *Williams v. United States*, 327 U.S. 711 (1946) (Indian reservations); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940) (post offices); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (national parks); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (locks and dams); *United States v. Unzueta*, 281 U.S. 138 (1930) (land used for forts and military reservations); *McKelvey v. United States*, 260 U.S. 353 (1922) (public lands); *Capetola v. Barclay White Co.*, 139 F.2d 556 (3d Cir. 1943) (navy yards); *Oklahoma City v. Sanders*, 94 F.2d 323 (10th Cir. 1938) (housing projects); *Air Terminal Servs., Inc., v. Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949) (airports).

<sup>3</sup>*Kay v. United States*, 255 F.2d 476 (4th Cir. 1958), cert. denied, 358 U.S. 825 (1958).

<sup>4</sup>Va. Code Ann. § 18-75 (1950) provides: "No person shall drive or operate any automobile or other motor vehicle...while under the influence of alcohol...or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature."

<sup>5</sup>Va. Code Ann. § 18-76 (1950).

<sup>6</sup>Va. Code Ann. § 18-75.1 (Supp. 1958) provides: "In any criminal prosecution under § 18-75...no person shall be required to submit to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, breath, or other bodily substance; however, any person arrested for a violation of § 18-75...shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness."

"Only a physician, nurse, or laboratory technician, shall withdraw blood for

showing the results of such analysis,<sup>7</sup> and (c) the establishment of certain presumptions arising out of the finding.<sup>8</sup>

Appellant argued on appeal that the vial containing the blood sample and the certificate showing the results of the analysis were not properly received in evidence,<sup>9</sup> that admission of the certificate into evidence deprived him of his constitutional right of confrontation by

the purpose of determining the alcohol content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labeled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample.

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"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

Forty-seven states use chemical tests, including blood tests, to aid in the determination of intoxication in cases involving charges of driving while under the influence of alcohol. Twenty-three of these states sanction the use of the tests by statute. For an enumeration of the state statutes, see *Briethaupt v. Abram*, 352 U.S. 432, 1 L. Ed. 2d 448, 451 at n. 3 (1957).

<sup>7</sup>Va. Code Ann. § 18-75.2 (Supp. 1958) provides for a report of the blood test and, upon proper identification of the container, for a certificate being admitted as evidence of the results of the analysis.

<sup>8</sup>Va. Code Ann. § 18-75.3 (Supp. 1958) sets up the following presumptions based on the result of the blood analysis: "(1) If there was . . . 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants; (2) If there was . . . in excess of 0.05 per cent but less than 0.15 per cent by weight . . . such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused; (3) If there was . . . 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants." These presumptions are similar to those in § 11-902 of the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances.

<sup>9</sup>The facts used to substantiate this contention were (1) that there was no identification of the person who took the blood, thus no evidence that § 18-75.1 was complied with; (2) that appellant's arm was wiped off with alcohol through which the needle was inserted, which could have increased the alcoholic content; and (3) that a white substance was seen in the vial, which was assumed to be an anticoagulate, but which was not identified. 255 F.2d at 480.

witnesses,<sup>10</sup> and that the presumptions created deprived him of due process.<sup>11</sup> The court held, however, that since no question was raised below as to the proper identification of the vial and the certificate, receipt in evidence was properly made and that in a federal court the certificate would have been admissible in any event under the provisions of another federal statute.<sup>12</sup> Receipt in evidence of the certificate did not foreclose inquiry into the regularity of the procedure, but it was held that any inquiry would go to the weight of the evidence rather than to its admissibility.<sup>13</sup> Nor did the court find that admission of the certificate deprived appellant of his constitutional right of confrontation by witnesses.<sup>14</sup> On the question of due process, the

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<sup>10</sup>Id. at 480-81. Appellant argued that § 18-75.2 was unconstitutional as unduly precluding inquiry into the accurateness of the Medical Examiner's report, since "proper identification" of the vial was the only requirement for admitting the certificate into evidence. See note 7 *supra*. It was contended that since admission into evidence was not based on requirements other than identification of the vial, the details outlined in § 18-75.1 were rendered immaterial. Brief for Appellant, pp. 17-18 (on appeal), *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958); Brief for Appellant, pp. 10-14 (petition for certiorari), *Kay v. United States*, *supra*.

<sup>11</sup>255 F.2d at 481. The contention in this regard was that by allowing the presumption to be weighed against the evidence of appellant, the statute gives the presumption the effect of evidence and in so doing contravenes the due process clauses of the United States and Virginia Constitutions. Brief for Appellant, pp. 18-23 (on appeal), *Kay v. United States*, *supra*. In petition for certiorari, appellant also claimed that since petitioner did not request the blood analysis, as specified in § 18-75.1, *supra* note 6, its introduction as evidence constituted illegal search of his person and self-incrimination in contravention of the fourth and fifth amendments of the United States Constitution. Brief for Appellant, pp. 5-10 (petition for certiorari), *Kay v. United States*, *supra*.

<sup>12</sup>255 F.2d at 480. 28 U.S.C. § 1732 (1952) provides for admission in evidence, pursuant to statutory requirement, of writings made in the regular performance of the official duties of a public official.

<sup>13</sup>255 F.2d at 480. The courts of Virginia, in interpreting the regularity of this procedure, have used the following test: Was the evidence identifying the blood sufficient to establish beyond a reasonable doubt that the blood analyzed was that extracted from the accused? If not, a motion to exclude the findings will be sustained. *Newton v. City of Richmond*, 198 Va. 869, 96 S.E.2d 775 (1957); *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955). See also, *Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947); *Greenwood v. United States*, 97 F. Supp. 996 (D. Ky. 1951). These Virginia and federal decisions have strongly insisted that there be no missing link in the chain of identification. Since the substance to be analyzed must pass through several hands, the evidence, to be admissible, cannot leave to conjecture who had the sample and what was done with it between the taking and the analysis. See *McGowan v. Los Angeles*, 100 Cal. App. 2d 386, 223 P.2d 862 (1950); *Am. Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n*, 78 Cal. App. 2d 493, 178 P.2d 40 (1947); *Brown v. State*, 156 Tex. Crim. 144, 240 S.W.2d 310 (1951). See also, *State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947). For a thorough discussion of the evidence aspects of the problem see, *Annot.*, 21 A.L.R.2d 1216 (1952).

<sup>14</sup>255 F.2d at 480-81. The authorities show that when there is statutory authority for making a certificate by a public officer of acts which are within the scope of his

court reasoned that since a rebuttable presumption "neither restricts the defendant in the presentation of his defense nor deprives him of the presumption of innocence,"<sup>15</sup> there was no constitutional objection to the jury's consideration of the statutory presumption together with all of the other evidence.<sup>16</sup>

The briefs of both parties before the appellate court and on petition for certiorari in the United States Supreme Court centered exclusively around the questions of the admissibility of the evidence, the reasonableness of the statutory presumptions, and the constitutional issues of confrontation and due process.<sup>17</sup> The more fundamental problem of whether the *entire* Virginia statutory provision prohibiting drunken driving, prescribing a standard by which drunkenness can be measured, and establishing certain presumptions based on such finding is incorporated into federal law by the Assimilative Crimes Act of 1948 was not discussed. Potentially, every case under the Act presents the question of *how much state law is assimilated into federal law*. For example, it is possible that all of the substantive state law is incorporated, but that the procedural aspects of the state law are not assimilated. If a distinction between substance and procedure be

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duty as an officer, such certificate is normally receivable under the documentary evidence rule as an exception to the hearsay rule. For a general discussion see, Annot., 29 A.L.R. 289 (1924). The constitutional right of an accused to confrontation may not be invoked to exclude evidence otherwise admissible under well-established exceptions to the hearsay rule. *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954); *United States v. Leathers*, 135 F.2d 507 (2d Cir. 1943). See also, *Tot v. United States*, 319 U.S. 463 (1943). Cf., *Snyder v. Massachusetts*, 291 U.S. 97 (1933), arising under the fourteenth amendment and suggesting that the exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason of the general rule. The constitutional guaranty of confrontation carries with it the exceptions to the common law principle which it embodies. *Commonwealth v. Gallo*, 275 Mass. 320, 175 N.E. 718 (1931). See also, *Salinger v. United States*, 272 U.S. 542 (1926); *People v. Reese*, 258 N.Y. 89, 179 N.E. 305 (1932). Certificates quite comparable to the one in the principal case have been held admissible over objections upon similar constitutional grounds. *State v. Torello*, 103 Conn. 511, 131 Atl. 429 (1925); *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923); *Bracey v. Commonwealth*, 119 Va. 867, 89 S.E. 144 (1916). But cf. *Estes v. State*, 283 S.W.2d 52 (Tex. Crim. App. 1955).

<sup>15</sup>255 F.2d at 481. On the broad general question of the constitutionality of a statute or ordinance making one fact presumptive evidence of another fact, see, Annot., 51 A.L.R. 1139 (1927); Annot., 86 A.L.R. 179 (1933); Annot., 162 A.L.R. 495 (1946). See also, *Heiner v. Donnan*, 285 U.S. 312 (1932); *Western & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929); *Yee Hem v. United States*, 268 U.S. 178 (1925); *Hawes v. Georgia*, 258 U.S. 1 (1922); *Mobile, J. & K.C. R.R. v. Turnipseed*, 210 U.S. 35 (1910); *State v. Childress*, 78 Ariz. 1, 274 P.2d 333 (1954), 46 A.L.R.2d 1176 (1956); *Toms v. State*, 239 P.2d 812 (Okla. Crim. 1952); *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).

<sup>16</sup>255 F.2d at 481.

<sup>17</sup>See notes 9-11 *supra*.

meaningful in construing the Assimilative Crimes Act—and it would be in civil cases in federal courts based on diversity of citizenship—it is significant to inquire into the basis for such a distinction and how it would be drawn.

The Assimilative Crimes Act of 1948 specifically provides for the punishment of *any* act or omission punishable within the jurisdiction of the State.<sup>18</sup> In interpreting this language under prior Assimilative Crimes Acts, the courts have held that Congress may validly incorporate state laws into federal penal statutes,<sup>19</sup> and that an act may be criminal under both state and federal law.<sup>20</sup> Moreover, the Act applies to state statutes enacted after the effective date of the 1948 Act, as well as to those in force prior to that date.<sup>21</sup> The only patent exception to assimilation of a state criminal statute is the provision that if Congress had itself made certain conduct criminal the Act does not apply.<sup>22</sup>

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<sup>18</sup>See note 2 *supra*.

<sup>19</sup>*Hemans v. United States*, 163 F.2d 228 (6th Cir. 1947), cert. denied, 332 U.S. 801 (1947), rehearing denied, 332 U.S. 821 (1947).

<sup>20</sup>See *Westfall v. United States*, 274 U.S. 256 at 258 (1927).

<sup>21</sup>*United States v. Sharpnack*, 355 U.S. 286 (1957) upheld the constitutionality of the 1948 Act insofar as it makes applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated. The Act was held not to be an unconstitutional delegation to the states of Congressional legislative authority, but rather a deliberate and continuing adoption by Congress of such unpre-empted offenses and punishments as already put into effect by the respective states. *Id.* at 294. Black and Douglas, JJ., dissented on the ground that the Act is in conflict with the principle that Congress alone has the power to make rules governing federal enclaves. *Id.* at 297.

<sup>22</sup>See note 1 *supra*. *Williams v. United States*, 327 U.S. 711 (1946). It may be difficult to determine whether the Congressional definition of a criminal offense necessarily precludes assimilation of the state law—e.g., in order to secure a conviction, a federally defined crime may require a showing of intent, although the comparable state crime does not; in this situation it would appear that Congress has deemed intent an essential element and that the state law should not be adopted. A different result, however, seems proper when a state statute allows prosecution for an attempted crime, but where the attempt is not covered by a federal statute—e.g., the federal crimes of robbery, 18 U.S.C. § 2111 (1952), and larceny, 18 U.S.C. § 661 (1952), do not appear to include attempts, but only completed crimes. Moreover, there is no general attempt section in the Federal Criminal Code. But see *Fed. R. Crim. P.* 31(c). The same problems may arise where the crime to be assimilated is closely related to the specific federal crime—e.g., larceny is a federally defined crime within the enclaves, but burglary is not. 18 U.S.C. § 661 (1952). In view of the fact that there may be a burglary without a completed larceny, the creation of the federal crime of larceny should not be viewed as precluding the assimilation of the state offense of burglary. However, a completed larceny which included a burglary raises difficult questions. Although it may be argued that only the larceny can be prosecuted, it has been held that burglary and larceny are different crimes, and punishment for each is permitted. *Morgan v. Devine*, 237 U.S. 632 (1915); *Dunaway v. United States*, 170 F.2d 11 (10th Cir. 1948). See also, *Kirchheimer, The Act, The Offense and Double Jeopardy*, 58 *Yale L.J.* 513, 519 (1949).



Nevertheless, limitations to incorporation have been made by judicial decision. Two cases involving a Virginia segregation law<sup>23</sup> have held that the Assimilative Crimes Act should not be construed to adopt a state law inconsistent with a policy of Congress as expressed in a civil statute,<sup>24</sup> or in a regulation issued pursuant to statutory authority.<sup>25</sup> *Johnson v. Yellow Cab Transit Co.*,<sup>26</sup> in granting equitable relief from state seizure of a shipment of liquor destined for an army post in Oklahoma, indicated that federal courts are not bound by rulings of a state court regarding the statute in question, even though some part of the question involved a consideration of state law adopted by the federal government. The *Johnson* holding<sup>27</sup> tacitly contradicts *United States v. Andem*,<sup>28</sup> the only prior decision on the issue of whether a state court's interpretation of an assimilated statute is controlling.

In the *Andem* case a federal district court followed the state court's interpretation of a state statute, expressly holding it to be binding on federal courts. In that case an employee in a United States Post Office located in New Jersey was indicted under a New Jersey forgery statute for forging and counterfeiting the seal of a private corporation. The court held that by virtue of the earlier Assimilative Crimes Act of 1898 the federal government had jurisdiction to prosecute for an act which violates state law and which was committed in a building over which legislative jurisdiction has been ceded to the federal government.<sup>29</sup>

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<sup>23</sup>Va. Code Ann. §§ 18-327, 328 (1950).

<sup>24</sup>*Air Terminal Servs., Inc. v. Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949).

<sup>25</sup>*Nash v. Air Terminal Servs., Inc.*, 85 F. Supp. 545 (E.D. Va. 1949). The Administrator of Civil Aeronautics had not exercised his statutory power to issue regulations forbidding segregation at the Washington National Airport, a federal enclave located in Virginia. The court regarded its result of adopting the Virginia segregation statute, note 23 *supra*, as consistent with its earlier decision in the *Rentzel* case, note 24 *supra*, holding that when regulations to forbid segregation on the federal enclave were issued by the Administrator, assimilation of the state segregation laws was precluded. The *Rentzel* opinion, however, had relied upon the regulation as only a part of a general federal policy, and it would seem that this general policy could have been found sufficient to bar assimilation in *Nash v. Air Terminal Servs., Inc.*, *supra*.

<sup>26</sup>321 U.S. 383 (1944).

<sup>27</sup>*Id.* at 391.

<sup>28</sup>158 Fed. 996 (D.N.J. 1908).

<sup>29</sup>It was argued that the word "character" was inadvertently substituted for the word "charter" in the New Jersey criminal forgery statute, which was adopted by the Assimilative Crimes Act. The courts of New Jersey had established the rule that an engrossed act of the legislature, duly approved, signed, and filed, was conclusive evidence of its contents and could not be contradicted by any evidence whatsoever. The federal district court, in view of such state interpretation, refused to consider the word "character" as meaning "charter," and held that the seal

Although *Johnson* can be distinguished from *Kay* and *Andem* on the ground that applicability of the Assimilative Crimes Act was not decided, dictum in *Johnson* pointed up the fundamental question of which, if any, of the state penal statutes "are so designed that they could be adopted by the assimilative crimes statute."<sup>30</sup> Language used in three prior decisions gives an insight into the Supreme Court's interpretation of how much state law is assimilated by the Act. In *Puerto Rico v. Shell Co.*,<sup>31</sup> the court, in comparing the Assimilative Crimes Act to another federal statute which the case involved,<sup>32</sup> emphasized that details of the federal law as assimilated, "instead of being recited, are adopted by reference."<sup>33</sup> Moreover, in *United States v. Press Publishing Co.*,<sup>34</sup> the court held that the punishment in the federal courts for an offense committed on a government reservation can be "only in the way and to the extent that it would have been punishable if the territory embraced by such reservation had remained subject to the jurisdiction of the state."<sup>35</sup> Based on this reasoning, circulation on federal enclaves of a newspaper containing a criminal libel printed and primarily published in New York City was not held punishable in the federal courts under the Act, since conviction would be "disregarding the laws of that State and frustrating the plain purpose of such law, which was that there should be but a single prosecution and conviction."<sup>36</sup> Thus the court was guided by state interpretation of the New York statute in holding that the Assimilative Crimes Act did not apply at all, and a quashing of the conviction was affirmed. *United States v. Coppersmith*,<sup>37</sup> involving the number of peremptory challenges allowed in a federal prosecution for counterfeiting, said in dictum that when state laws are adopted by the Assimilative Crimes Act, "they stand as if the act of Congress had defined the offenses in the very words of the state law."<sup>38</sup>

In the *Andem* case the federal court, after holding state interpretation of the adopted statute binding on federal courts, incorporated the substantive state offense and excluded the procedural aspects;

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of a corporation must be regarded as a "character" within the meaning of the adopted act. *Id.* at 998-99.

<sup>30</sup>321 U.S. at 389.

<sup>31</sup>302 U.S. 253 (1937).

<sup>32</sup>26 Stat. 209 (1890) (Sherman Anti-Trust Act).

<sup>33</sup>302 U.S. at 266.

<sup>34</sup>219 U.S. 1 (1911).

<sup>35</sup>*Id.* at 10.

<sup>36</sup>*Id.* at 15.

<sup>37</sup>4 Fed. 198 (W.D. Tenn. 1880).

<sup>38</sup>*Id.* at 205.

there, the court upheld application of the federal statute of limitations over the state statute of limitations, principally on the ground that the state statute of limitations was embodied in a different statute from that which defined the assimilated offense.<sup>39</sup> This brings into focus the significance of the substantive-procedural distinction in such cases, for had the statute of limitations been included in the same statute or section that defined the crime, it would probably have been construed as applicable to the right itself, rather than to the remedy; accordingly, in such a case, the statute of limitations would be regarded as substantive.<sup>40</sup>

Although *Andem* is the only case prior to *Kay* involving the Assimilative Crimes Act that draws such a distinction as a basis for not adopting a state statute which relates to the remedy but not to the elements of the offense in question, the *Kay* decision concluded that the presumptions embodied in the Virginia statute proscribing drunken driving are not merely procedural, for they amount to a redefinition of the offense and that as a new definition of the substantive offense are adopted by the Assimilative Crimes Act of 1948.<sup>41</sup> Although presumptions, except for conclusive presumptions, are almost unanimously regarded as matters of procedure,<sup>42</sup> the court's language in *Kay* is generally in accord with the conflict of laws principle that the court of the forum determines, in accordance with its own conflict of laws principles, whether the question involved is one of substance or procedure.<sup>43</sup> Thus, in view of the language in the *Johnson*, *Puerto Rico* and *Press Publishing Co.* cases and because the Assimilative Crimes Act of 1948 specifically provides that an act will be federally punishable "if it would be punishable if committed . . . within the jurisdiction of the State,"<sup>44</sup> a conflict of laws analogy seems appropriate in cases involving the Act.

It therefore appears that in a case involving the Assimilative Crimes Act the federal court must first determine how much of the state law is adopted by the Act. It further appears that the distinction between substantive law and procedure is a determinant in reaching

<sup>39</sup>158 Fed. at 1000.

<sup>40</sup>Goodrich, *Conflict of Laws* 243 (3d ed. 1949).

<sup>41</sup>255 F.2d at 479-80.

<sup>42</sup>Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 192 (1944); Goodrich, *op. cit. supra* at 237.

<sup>43</sup>Goodrich, *op. cit. supra* at 228. Cf., Morgan, *op. cit. supra* at 194: "That presumptions are properly classified as procedural is beside the point. The desirability of securing identity of result in whatever forum the controversy is tried ought to be controlling . . ."

<sup>44</sup>See note 1 *supra*.

such a decision and that the federal court itself will decide the substantive-procedural issue rather than look to state interpretation.<sup>45</sup> The court's language in *Kay* was emphatic on this latter point, although the court did rely on Virginia judicial construction of the statute in question: "Indeed state interpretation of the adopted statutes is not binding upon a federal court, and federal, rather than state, rules of evidence are applicable to all prosecutions under the Act."<sup>46</sup> On this point, the court in *Kay* refers to similar language in *Johnson*.<sup>47</sup> No reference was made in *Kay* to a contrary holding in *Andem*; the fact that *Andem* was decided by a district court in another federal circuit and that *Johnson* was decided by the U.S. Supreme Court may be significant in this respect.<sup>48</sup>

The language in *Kay* that a federal court is not bound by state interpretation may be construed as a reservation of the right not to be so bound, but not as a denial of the federal court's privilege to look to state construction when such is deemed by the court as appropriate. It might seem that since the Assimilative Crimes Act provides that an act will be federally punishable if it would be punishable if committed within the jurisdiction of the state, Congress intended to adopt not only the state criminal statutes, but also the state courts' interpretations of those statutes. The *Press Publishing Co.* case turned on the point that the state court's interpretation was controlling;<sup>49</sup> that case was not cited by the *Kay* court, although it was a Supreme Court decision. Thus *Johnson* and *Kay* appear to pull the teeth of *Andem* and *Press Publishing Co.* on the question of state interpretation of a statute adopted by the Act.

Several conclusions can be reached in view of the *Kay* decision regarding the problems of the extent of state law adopted by the Assimilative Crimes Act and of the criteria for determining such. In the first place, the federal court has reserved the right to interpret a state statute rather than to look solely to state construction. In this regard, it can be reasonably assumed that Congressional intent in enacting a statute specifically adopting state crimes as federal offenses will be considered by a federal court and that implementation of such intent will be a factor in whether the court relies partially or totally on state interpretation or whether it disregards state interpre-

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<sup>45</sup>See *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940), cert. denied, 310 U.S. 650 (1940).

<sup>46</sup>255 F.2d at 479.

<sup>47</sup>See text accompanying note 26 *supra*.

<sup>48</sup>See notes 26-27 *supra*.

<sup>49</sup>See notes 33-34 *supra*.

tation in favor of its own construction. Moreover, one of the criteria utilized by the federal court will be its own interpretation of the substantive-procedural aspects of the state statute. That federal rules of evidence are used in cases under the Act has been neither challenged nor denied.<sup>50</sup> But the federal court itself will interpret those elements which bear varying degrees of relation to the offense adopted and will, in accordance with its interpretation, adopt them in lieu of or reject them in favor of federal procedure.

Telescoping the opinion in *Kay*, it can be said that the court noted that while the statutory section providing for a blood test and also prescribing the details of such test is largely procedural, "it is a preliminary, pre-judicial procedure . . . designed . . . to insure the reliability of the report of the test and to protect the validity of the presumptions . . . [which] presumptions are not merely procedural, for they amount to a redefinition of the offense . . . [and] as a new definition of the substantive offense . . . [were] adopted by the Assimilative Crimes Act of 1948."<sup>51</sup>

FRANK C. BOZEMAN

### ENTRAPMENT RE-EXAMINED BY UNITED STATES SUPREME COURT

Two questions that continue to arise in connection with the defense of entrapment<sup>1</sup> are how far may the police go in acting as decoys to apprehend criminals and who decides whether permissible limits have been overstepped. Although the Supreme Court apparent-

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<sup>50</sup>Fed. R. Crim. P. 26: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See 4 Barron, Federal Practice and Procedure 172 (1951). "The procedure is entirely federal. There is no occasion to look to the state law. Consequently it is more important that uniform rules of the law and of evidence be applied in all the courts of the United States in criminal matters than that a particular rule of evidence be given effect because favored in the courts of a particular state." *Id.* at 174.

<sup>51</sup>255 F.2d at 479-80.

<sup>1</sup>The question of lack of consent or some other element necessary to constitute a particular crime is not considered under entrapment as treated here. Actions of the victim or those acting with him can be dealt with under the term "entrapment." Hitchler, *Entrapment as a Defense in Criminal Cases*, 42 Dick. L. Rev. 195 (1938). But the inducement by police officers to commit a crime is the modern concept of entrapment. *Scriber v. United States*, 4 F.2d 97 (6th Cir. 1925).

ly answered these questions in 1932, the problems continually recur in practice because of the enthusiasm of police officials in performing their designated duties.<sup>2</sup> In two recent cases, the United States Supreme Court re-examined and reaffirmed principles which it had earlier delineated for the federal court system.<sup>3</sup>

In *Sherman v. United States*<sup>4</sup> a government informer met the petitioner in a doctor's office where both were ostensibly undergoing treatment for narcotics addiction. The acquaintanceship grew through subsequent meetings, finally reaching the point where mutual addiction problems were freely discussed. The informer represented that he was not responding to treatment and asked the petitioner to obtain narcotics for him. Only after repeated requests containing references to the informer's feigned suffering did the petitioner obtain the narcotics for him. The informer used government-supplied money to pay the petitioner one-half the cost of the narcotics. The petitioner claimed that these facts constituted entrapment. This issue was submitted to the jury, which rejected it as a defense. Accordingly, the petitioner was convicted of an illegal sale of narcotics.

In *Masciale v. United States*<sup>5</sup> the petitioner was introduced by a third party to a government agent posing as a narcotics buyer. The agent testified that he made known his desire to purchase narcotics at their first meeting and that petitioner stated that he knew someone from whom the agent could purchase heroin. The petitioner denied this, claiming that he originally met the agent only to help the informer impress the third party. After at least ten conversations during which time the petitioner told the agent that he was trying to contact his source, the petitioner finally introduced the agent to a person who sold some narcotics to the agent. Again, the jury found no entrapment and convicted.

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<sup>2</sup>According to the federal courts, the entrapping person must be an agent or officer of the government; inducement by a private person does not make the defense available. *Polski v. United States*, 33 F.2d 686 (8th Cir. 1929), cert. denied 280 U.S. 591 (1929). However, courts have considered paid informers and those promised immunity to be government agents. *Cratty v. United States*, 163 F.2d 844 (D.C. Cir. 1947); *Hayes v. United States*, 112 F.2d 676 (10th Cir. 1940); *Wall v. United States*, 65 F.2d 993 (5th Cir. 1933). Cf. *Mayer v. United States*, 67 F.2d 223 (9th Cir. 1933).

<sup>3</sup>The state legislatures usually leave the entrapment issue to court determination. Tennessee and New York have rejected the defense. *People v. Mills*, 178 N.Y. 274, 70 N.E. 786 (1904); *Thomas v. State*, 182 Tenn. 380, 187 S.W.2d 529 (1945). For an example of state court treatment of the defense see Note, 14 Wash. & Lee L. Rev. 88 (1957).

<sup>4</sup>356 U.S. 369 (1958).

<sup>5</sup>356 U.S. 386 (1958).

The issue before the Supreme Court in both of these cases was whether the defense of entrapment should have been established as a matter of law. The Court held in *Sherman* that entrapment was so established. Mr. Chief Justice Warren pointed out that the arranged meetings, the conversations relating to addiction, and the resort to sympathy made the criminal conduct the product of creative police activity. Furthermore, an examination of the accused's past record did not show any ready compliance on his part to engage in the narcotics trade. Four Justices, in a concurring opinion by Mr. Justice Frankfurter, disagreed with the reasoning employed by the Court to determine the existence of the defense. Justice Frankfurter stated that the appropriate test should be a comparison of the police methods actually employed in a particular case with a standard of permissible techniques which the police should use. Under this test any examination of the accused's past record would be excluded.<sup>6</sup>

In *Masciale* the conflict between the agent's testimony and the petitioner's claim of an easy-money lure as his reason for entering the narcotics trade was held sufficient to justify sending the issue of entrapment to the jury. However, the Justices who concurred in *Sherman* dissented in *Masciale* on the ground that the defense should be determined by the judge—not by the jury.

The distinction between proper and improper criminal detection methods was recognized in early twentieth century federal court cases allowing the use of decoy letters to obtain information.<sup>7</sup> With the passage of the National Prohibition Act and the intensification of police investigation in other criminal areas where detection is difficult, the scope of authorized detection means was broadened,<sup>8</sup> and cases in which the plea of entrapment was utilized increased consid-

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<sup>6</sup>The admissibility of evidence of past offenses has been assailed. It has been stated that usually such evidence is allowed only to prove an element of the crime, but in entrapment cases all elements of the crime itself are already proved or admitted. Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245, 252 & n. 38 (1942). See *United States v. Washington*, 20 F.2d 160, 163 (D. Neb. 1927) denying the admissibility of hearsay, suspicions, and past offenses. But see *United States v. Johnson*, 208 F.2d 404 (2d Cir. 1953), cert. denied 347 U.S. 928 (1954); *Carlton v. United States*, 198 F.2d 795 (9th Cir. 1952); *Ryles v. United States*, 183 F.2d 944 (10th Cir. 1950), cert. denied 340 U.S. 877 (1950); *Strader v. United States*, 72 F.2d 589 (10th Cir. 1934); *United States v. Seigel*, 16 F.2d 134 (D. Minn. 1926). Also see I Wigmore, *Evidence* § 58 (Supp. 1957).

<sup>7</sup>*Grimm v. United States*, 156 U.S. 604 (1895); *Ackley v. United States*, 200 Fed. 217 (8th Cir. 1912); *Ennis v. United States*, 154 Fed. 842 (2d Cir. 1907). See Annot., 18 A.L.R. 146 (1922).

<sup>8</sup>Such activities as the use of disguises, *United States v. Washington*, supra note 6, and the use of normal coaxing, *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925) were included as permissible police methods.

erably.<sup>9</sup> While recognizing the need for unusual police activity in detecting and apprehending criminals, courts advised against any governmental methods which "may become the means of the ruin of its citizens, instead of their safeguard and protection."<sup>10</sup>

The entrapment rule to be applied in the federal courts was first crystallized in the landmark case of *Sorrells v. United States*.<sup>11</sup> In this case the government agent induced the defendant to supply him with liquor by repeated requests which included sentimental stories of wartime experiences as members of the same service division. The Supreme Court reversed the lower court's finding and ruled that the defense of entrapment was available.

The two-fold test established by the *Sorrells* case looked both to the origin of the intent to commit the offense and to the predisposition of the accused. The essential questions to be asked under this test were whether the police or the accused conceived the criminal action and whether an examination of the accused's past indicated a predisposition to commit the crime.<sup>12</sup> If the crime was the result of the creative activity of the police and if the accused was not predisposed to commit the crime, then the defense of entrapment was available.

Mr. Justice Roberts, in his separate concurring opinion in *Sorrells*, said the sole criterion for determining the entrapment issue was the police conduct test. If the methods employed to obtain a conviction were improper, an entrapment plea was valid. He emphasized that no matter how bad the past record of the accused may have been, such prior acts never justified improper criminal detection means.<sup>13</sup>

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<sup>9</sup>Compare the number of cases listed in Annot., 18 A.L.R. 146 (1922) with those in Annot., 66 A.L.R. 478 (1930).

<sup>10</sup>*United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918). Among the cases setting forth specific methods which courts have condemned are: *Hunter v. United States*, 62 F.2d 217 (5th Cir. 1932) (appeals to kindness); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921) (supplication to relieve suffering); *Woo Wai v. United States*, 223 Fed. 412 (9th Cir. 1915) (continued persuasion). See also *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925).

<sup>11</sup>287 U.S. 435 (1932).

<sup>12</sup>The meaning of "predisposed" has been suggested as "some known or reasonably suspected previous connection with the unlawful course of conduct which prompted the entrapment." Note, 18 U. Pitt. L. Rev. 663, 665 (1957). There is a contention that the use of reasonable suspicion to rebut entrapment bears no relevance to the origin of the criminal intent, but the cases do not support this contention. *Rossi v. United States*, 293 Fed. 896 (8th Cir. 1923); *United States v. Certain Quantities of Intoxicating Liquors*, 290 Fed. 824 (D. N.H. 1923); *Fisk v. United States*, 279 Fed. 12 (6th Cir. 1922); *Billingsley v. United States*, 274 Fed. 86 (6th Cir. 1921); *Partan v. United States*, 261 Fed. 515 (9th Cir. 1919).

<sup>13</sup>The view of Justice Roberts has been suggested as being "more consistent with the rationale of the entrapment doctrine." Anderson, *Some Aspects of the Law of*



While there does not necessarily appear to be any correlation between a specific doctrinal approach to the defense and the particular test adopted, the theoretical justifications for the defense did differ in the two opinions of *Sorrells*. This fact may possibly help to explain the test variations seen in each opinion. Mr. Chief Justice Hughes, in the majority opinion, declared that Congress did not intend criminal statutes to apply in cases where the innocent were enticed to commit wrong. This implied legislative intent contrasts sharply with Justice Roberts' theoretical basis for the defense, which seemed to stem from an anxiety to protect the courts from any stigma of participation in entrapment-procured convictions.<sup>14</sup>

Before *Sorrells* the federal courts took the position that "where the evidence on the question of entrapment is in conflict it presents an issue of fact for the jury on proper instructions, and it is not within the province of the court to decide it."<sup>15</sup> The Court in *Sorrells* followed this jury-determination view, which remains the prevailing one today unless the issue can be decided as a matter of law.<sup>16</sup>

On the other hand, Justice Roberts believed that the judge should always rule on the entrapment issue. Stating that "the preservation of the purity of its own temple belongs only to the court,"<sup>17</sup> he felt that the court should deal with the issue whenever it arose. A definite interrelation between Justice Roberts' doctrinal theory of the defense and his view of who should determine the issue can be seen, for the underlying considerations in each appears to be the protection of the courts from the stain of entrapment.

The issue of judge or jury determination becomes pointedly significant in the *Masciale* case. In *Masciale* the concurring Justices of *Sherman* dissented because they believed that the trial judge should

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Entrapment, 11 Brooklyn L. Rev. 187, 196 (1942). In addition this view has also been said to be less strained because the moral guilt of the defendant seems the same in government-procured crimes as in enticement by a private person. Note, 46 Harv. L. Rev. 848 (1933).

<sup>14</sup>287 U.S. at 457.

<sup>15</sup>*Jarl v. United States*, 19 F.2d 891, 896 (8th Cir. 1927). See *O'Brien v. United States*, 51 F.2d 674 (7th Cir. 1921); *Butts v. United States*, 273 Fed. 35 (8th Cir. 1921); *Peterson v. United States*, 255 Fed. 433 (9th Cir. 1919). But some pre-*Sorrells* authority existed that the court should decide the issue whenever it was asserted. *United States v. Mathues ex rel. Hassel*, 22 F.2d 979 (E.D. Pa. 1927); *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918); *United States v. Healy*, 202 Fed. 349 (D. Mont. 1913). The standard view that the jury should determine the issue remains unchanged since *Sorrells*. *United States v. Klosterman*, 248 F.2d 191 (3d Cir. 1957).

<sup>16</sup>356 U.S. at 377.

<sup>17</sup>287 U.S. at 457. This concept was foreshadowed by the language of Justice Brandeis in an earlier dissent. *Casey v. United States*, 276 U.S. 413, 425 (1928).

rule on the entrapment question. The five-four decision in the latter case may be indicative of more scrutinizing judicial inquiries into this phase of entrapment in the future.

The unusual nature of the defense of entrapment which finds its roots in idealism from its ethical genesis,<sup>18</sup> and in realism from its practical policy considerations,<sup>19</sup> certainly does not facilitate the easy establishment of specific standards for its application. The proper consideration of individual fact situations<sup>20</sup> and a balancing of conflicting interests, championed by those who see the problem as essentially one of practical law enforcement,<sup>21</sup> have been urged as necessary whenever the defense is employed. Such considerations are reasonable and perhaps often required, but it cannot be denied that they make more difficult the application of any explicit standards to an entrapment case. In addition, certain practical difficulties, such as ascertaining just what kind of conduct on the part of the accused determines whether he was "predisposed"<sup>22</sup> to commit the crime, present a fertile area for criticism of the defense as it is applied in the federal court system today.

If a synthesis of the divergent views expressed in *Sorrells* and reiterated in *Sherman* were possible, it would seem that a combination of Justice Roberts' police conduct test and the usual jury determination of the issue would be desirable. Of course, the adoption of the police conduct test presents certain problems. In mitigation of the

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<sup>18</sup>It has been said that the courts categorize the defense as a recognized principle of law even though "it is based more on ethical than legal principles." Anderson, *supra* note 13, at 188. Justice Roberts compared entrapment cases to civil actions which are abated when in violation of the "rules . . . which formulate the ethics of men's relations to each other." 287 U.S. at 455.

<sup>19</sup>Consideration of such elements as the type and frequency of the crime, the difficulty of getting evidence, and the public danger involved reflect this practical aspect. Note, 28 N.Y.U.L. Rev. 1180, 1182 (1953).

<sup>20</sup>*Zucker v. United States*, 288 Fed. 12, 16 (3d Cir. 1923); *United States v. Washington*, 20 F.2d 160 (D. Neb. 1927). See also, Note, 28 Colum. L. Rev. 1067, 1072 (1928). Chief Justice Hughes seemed to appreciate this individual fact consideration when he said: "The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object." 287 U.S. at 451.

<sup>21</sup>Note, 44 Harv. L. Rev. 109 (1930). It would appear that the law enforcement interpretation of the problem is complementary to an emphasis on the practical considerations of the defense. If the facilitating of law enforcement is desired, a weighing of interests would seem to aid the accomplishment of this end.

<sup>22</sup>See note 6 *supra*. Judge Learned Hand has suggested three instances in which an inducement may be excused: "an existing course of similar criminal conduct; . . . already formed design . . . ready compliance." *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933).

criticism that secret criminal activities would be impossible to uncover under such a test,<sup>23</sup> it should be emphasized that the more heinous crimes, such as murder and rape, do not "lend themselves to entrapment; nor is detection an unusual problem."<sup>24</sup> The probable answer would be that when organized crime has perfected covert criminal activity almost to a science, many serious crimes might be rendered more difficult of proof if the predisposition element of the entrapment test were omitted. Perhaps the best answer to this seemingly valid statement would be the oft-quoted words of Chief Justice Holmes that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."<sup>25</sup> It is submitted that the primary purpose of the defense is to protect the innocent from inordinate police activity. If this be true, the limitation of the test *only* to an examination of the police conduct used would appear to serve this purpose best.

The orthodox viewpoint of the courts that the jury should determine the question seems more sound than the minority contention that the judge should so rule. An objective standard—conduct which is no greater than that which would entice "a person engaged in an habitual course of conduct for gain and profit"<sup>26</sup> to commit a crime—has been advanced as the yardstick against which to measure the police conduct utilized in each case. This standard would have to be applied by the jury much like the jury applies the "reasonable man" standard in the negligence cases of tort law; however, the judge could still find the existence of entrapment as a matter of law whenever the evidence warranted such a ruling.

It is evident from a comparison of the two opinions in the *Sherman* case that no matter which approach is upheld, supporters of both views desire the accomplishment of the same end: the detection

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<sup>23</sup>Judge Hand raised this question in *United States v. Sherman*, 200 F.2d 880, 882 (1952). Apparently the criticism is directed at the lack of any way to show the accused was merely furnished an opportunity to commit a crime of the type in which he was prepared to engage. Practically speaking, it would seem a long record of convictions of similar offenses would place the minority's position in danger of being compromised.

<sup>24</sup>Note, 35 Texas L. Rev. 129 (1956). The Court refused to say whether such crimes would prevent any exception to a statutory prohibition in entrapment cases as the Court allowed in *Sorrells*, 287 U.S. at 450-52.

<sup>25</sup>*Olmstead v. United States*, 277 U.S. 438, 470 (1928).

<sup>26</sup>Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L.J. 1091, 1114 (1951). This standard is presented with the view that only an examination of the officer's conduct is proper in the test for entrapment.

of the criminal and the protection of the innocent.<sup>27</sup> There can be little doubt that whichever approach ultimately prevails, this aim, a constant goal in the field of the protection of individual rights, assures the continued use of the defense of entrapment.

NICHOLAS W. BATH

### THE COMMON LAW WIFE AND WORKMEN'S COMPENSATION

In recent years Indiana, through legislative enactment and judicial decision, has been developing and voicing a dislike for the common-law marriage.<sup>1</sup> In 1957 this attitude culminated in legislation abolishing common-law marriage in the state.<sup>2</sup> For ten years prior to this abolition, however, Indiana's Workmen's Compensation Act contained a provision which, as interpreted in the case of *Stoner v. Howard Sober, Inc.*,<sup>3</sup> appears to have resulted in a denial of equal protection of the laws.

In the *Stoner* case, Mrs. Stoner, a party to a common-law marriage of four years, ten months, and nineteen days, was denied compensation after the accidental death of her husband because she failed to satisfy a requirement of section 40-1403a of the Indiana Workmen's Compensation Act, which provides in part as follows:

"Total dependency—The following persons are conclusively presumed to be wholly dependent for support upon a deceased employee and shall constitute the class known as presumptive dependents in the preceding section:

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<sup>27</sup>The Court in *Sherman* said: "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman v. United States*, 356 U.S. 369, 372 (1958). The concurring opinion contained these words: "[I]n holding out inducements they [police] should act in such a manner as is likely to induce to the commission of crime only these persons [criminals] and not others who would normally avoid crime and through self-struggle resist ordinary temptations." *Id.* at 384.

<sup>1</sup>The great weight of modern American authority on the subject supports and advocates this shift away from recognizing common-law marriages. The American Bar Association, the Commission on Uniform State Laws, and almost every authority in the field of social reform favors the abolition of the institution of common-law marriage. 1 Vernier, *American Family Laws* § 26 at 108 (1931). For a more detailed discussion of this shift see note 22 *infra*.

<sup>2</sup>"All marriages known as 'common law marriages' entered into subsequent to the effective date of this act shall be and the same are hereby declared null and void." Ind. Acts 1957, ch. 78, § 1.

<sup>3</sup>149 N.E.2d 121 (Ind. App. Ct. 1958).

(a) A wife upon a husband with whom she is living at the time of his death, or upon whom the laws of the state impose the obligation of her support at such time. *The term 'wife' as used in this subsection shall exclude a common-law wife unless such common-law relationship shall have existed openly and notoriously for a period of not less than five [5] years immediately preceding the death.*"<sup>4</sup>

The Indiana Industrial Board<sup>5</sup> found that Mrs. Stoner's common-law marriage, contracted on March 19, 1946, had not existed "openly and notoriously" for five years immediately prior to her husband's death on February 9, 1951, and therefore she was not entitled to an award of compensation. The case was appealed three times.<sup>6</sup> Each time compensation was denied. In each of the three hearings, appellant's counsel attempted to challenge the constitutionality of section 40-1403a, claiming that it denied Mrs. Stoner equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution<sup>7</sup> and article I of the Indiana Constitution.<sup>8</sup> The court in the principal case refused to allow the constitutional question to be raised, stating that appellant lacked standing to thus challenge the section.<sup>9</sup> The court further stated that "the rights and duties provided in the Workmen's Compensation Act are contractual in nature and arise out of the voluntary acceptance of the terms thereof on the part of the employer and the employee."<sup>10</sup> Having agreed to the section as a provi-

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<sup>4</sup>Ind. Ann. Stat. § 40-1403a (Burns' 1952 Replacement). (Emphasis added).

<sup>5</sup>"The industrial board shall have immediate charge of the administration of the provisions of the workmen's compensation act [§§ 40-1201-40-1414, 40-1503-40-1704] and such other duties as are hereinafter prescribed in this act [§§ 40-2104a, 40-2105, 40-2108]." Ind. Ann. Stat. § 40-2105a (Burns' 1952 Replacement).

<sup>6</sup>Mrs. Stoner appealed the original award of the Industrial Board denying her compensation. The Indiana Appellate Court found the Board's conclusion that claimant was not a dependent within the meaning of the Workmen's Compensation Act insufficient to support the award, in that it did not exclude every possibility of recovery. The cause was remanded for further proceedings. *Stoner v. Howard Sober, Inc.*, 124 Ind. App. 581, 118 N.E.2d 504 (1954). On remand, the Board made the same findings of fact and conclusions of law that were deemed surplusage in the first appeal. The case was reversed and remanded again, with directions to make specific findings of fact as to the actual dependency of the claimant. *Stoner v. Howard Sober, Inc.*, 141 N.E.2d 458 (Ind. App. Ct. 1957). In the determination in question, which was the third appeal, the amended and expanded award of the Board was affirmed, even though the claimant was still denied compensation. *Stoner v. Howard Sober, Inc.*, 149 N.E.2d 121 (Ind. App. Ct. 1958).

<sup>7</sup>"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

<sup>8</sup>"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. I, § 23.

<sup>9</sup>149 N.E.2d at 123.

<sup>10</sup>*Ibid.*

sion of his contract with his employer, the decedent "would be in no position to challenge his own voluntary agreement as depriving him of his constitutional rights; and, as appellant acquires any rights she may possess as a dependent of the decedent solely under and by virtue of his said contract, she, too, is in no position to challenge said contract as depriving her of the asserted constitutional right."<sup>11</sup>

In effect the court held that the decedent, by contractually agreeing to section 40-1403a of the Act, waived his wife's derivative right to challenge the section as denying her equal protection of the laws. Ordinarily an individual can waive any right which has been provided for his benefit either by contract, by statute, or by constitution.<sup>12</sup> "To constitute a 'waiver' there must be generally, first, an *existing right, benefit, or advantage*; secondly, knowledge, actual or constructive, of the existence of such right, benefit, or advantage; and, lastly, an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment."<sup>13</sup> Thus it is possible to waive voluntarily and intentionally an *existing constitutional right*, as long as such a waiver is not against public policy.<sup>14</sup> It is doubtful, however, under the facts of the principal case, whether there was an *existing right* which decedent could effectively waive. Nowhere in the report is there any mention of the date on which the decedent voluntarily contracted and elected to accept and to be bound by the provisions of the Workmen's Compensation Act. If the contract under the Act was made prior to the contract of marriage, then any waiver resulting from the former contract and relating to the rights of the parties to the marriage would be a waiver of a non-existent right, rather than an effective waiver of an existing right. The court not only fails to discuss the possibility of there being such an ineffective waiver, but it also

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<sup>11</sup>Ibid.

<sup>12</sup>Gilman v. Butzloff, 155 Fla. 888, 22 So. 2d 263, 265 (1945); Kempa v. State, 58 N.E.2d 934, 935 (Ind. 1945); Brown v. State, 219 Ind. 251, 37 N.E.2d 73, 77 (1941); Bachelor v. State, 189 Ind. 69, 125 N.E. 773, 776 (1920); Lamb v. Davis, 56 N.W.2d 481, 483 (Iowa 1953); Hittson v. Chicago, R.I. & P. Ry., 43 N.M. 122, 86 P.2d 1037, 1039 (1939); Cameron v. McDonald, 216 N.C. 712, 6 S.E.2d 497, 499 (1940).

<sup>13</sup>Cliett v. Williams, 97 S.W.2d 272, 274 (Tex. Civ. App. 1936). (Emphasis added). Accord, San Bernadino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487, 488 (1895); National Paraffine Oil Co. v. Chappellet, 4 Cal. App. 505, 88 Pac. 506, 507 (1906); Jonas v. City of W. Palm Beach, 76 Fla. 66, 79 So. 438, 441 (1918); State v. City of Anaconda, 41 Mont. 577, 111 Pac. 345, 347 (1910).

<sup>14</sup>"It is a general rule that any right or privilege to which a person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the constitution, may be waived by him; provided it is intended for his sole benefit, and does not infringe upon the rights of others, and such waiver is not against public policy." Hittson v. Chicago, R.I. & P. Ry., 43 N.M. 122, 86 P.2d 1037, 1039 (1939).

ignores the principle that "a State can not grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether."<sup>15</sup> Thus there seems to be some question as to whether the court was correct when it stated that decedent contractually waived his 'right, and thereby appellant's right, to challenge the constitutionality of the provision. For the remainder of this comment it will be assumed that the decedent did not effectively waive his constitutional right and that Mrs. Stoner, by virtue of her position as widow of the decedent, has the right to challenge the constitutionality of section 40-1403a.

In 1947 the Indiana Legislature enacted section 40-1403a to introduce an element of certainty into the awarding of compensation to common-law wives, and to reduce the possibility of recovery by a party to a meretricious union.<sup>16</sup> The purpose of this section was not to discriminate between one legal wife and another legal wife, but instead it was to insure that the common-law relationship was genuine, not merely transitory and meretricious.<sup>17</sup> At first glance section 40-1403a seems well designed to achieve this purpose, but upon reconsideration it appears that in addition to achieving its stated purpose, the section also: (1) effects a result that is clearly contrary to the acknowledged purpose of workmen's compensation acts, (2) elevates a mere matter of difficulty of proof into a position of public policy, and (3) contains a classification that is apparently unconstitutional.

As announced by the Indiana Appellate Court in *In re Duncan*,<sup>18</sup> the general underlying purpose of that state's Workmen's Compensation Act is to place the economic burden and loss arising from the injury to an employee on the employer and his consumers, rather than on the dependents of the injured employee. In fact, the title of the Indiana Act itself states that one of its purposes is "to provide compensation for injuries and death of employees resulting from" accidents arising out of and in the course of their employment.<sup>19</sup> The effect of section 40-1403a, which denies compensation to a common-law wife unless she has lived "openly and notoriously" with her husband for five years immediately prior to his death, is clearly opposed to this acknowledged purpose. The section makes it impossible for a common-law wife, whose marriage is of less than five years

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<sup>15</sup>*City of Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296, 299 (1939).

<sup>16</sup>Note, 32 Ind. L.J. 99, 108 (1956).

<sup>17</sup>*Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).

<sup>18</sup>73 Ind. App. 270, 127 N.E. 289, 291 (1920).

<sup>19</sup>See Title, Ind. Acts 1929, ch. 172.

duration, to recover an award as a presumptive dependent. Such a wife, and not industry, is burdened with the economic loss resulting from her husband's death.

The Indiana Act, prior to the passage of section 40-1403a, made no distinction between wives based upon the type or duration of their marriage.<sup>20</sup> A common-law wife was allowed to recover when her marriage was established by that weight of evidence required for the proving of a common-law marriage under other circumstances. The recognized difficulty involved in proving such a marriage was one of the factors which initially led to the passage of this section, and then in turn to the complete abolition of common-law marriage in 1957. Prior to this abolition Indiana recognized common-law marriage,<sup>21</sup> although somewhat reluctantly in recent years.<sup>22</sup> This recognition was in line with the accepted policy of encouraging marriage.<sup>23</sup> In *Teter v. Teter*, the Indiana Appellate Court made the following

<sup>20</sup>*Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).

<sup>21</sup>"No marriage shall be void or voidable for the want of license or other formality required by law, if either of the parties thereto believed it to be a legal marriage at the time." Ind. Ann. Stat. § 44-302 (Burns' 1952 Replacement). Prior to 1957, the courts of Indiana consistently recognized the validity of common-law marriages. *Anderson v. Anderson*, 235 Ind. 113, 131 N.E.2d 301 (1956); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *Schumacher v. Adams County Circuit Court*, 225 Ind. 200, 73 N.E.2d 689 (1947); *Cossell v. Cossell*, 223 Ind. 603, 63 N.E.2d 540 (1945); *Norrell v. Norrell*, 220 Ind. 398, 44 N.E.2d 97 (1942); *Argiroff v. Argiroff*, 215 Ind. 297, 19 N.E.2d 560 (1939); *United States Steel Corp. v. Weather-ton*, 126 Ind. App. 189, 131 N.E.2d 335 (1956); *In re Dittman's Estate*, 124 Ind. App. 198, 115 N.E.2d 125 (1953); *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398 (1949); *Schilling v. Parsons*, 110 Ind. App. 52, 36 N.E.2d 958 (1941); *Vincennes Bridge Co. v. Vardaman*, 91 Ind. App. 363, 171 N.E. 241 (1930).

<sup>22</sup>The shift in Indiana's attitude toward common-law marriage, from one of ready recognition and acceptance to one of reluctance and growing distaste, reflects the general trend in the United States. Although Lord Hardwicke's Act, 26 Geo. 2, c. 33 (1753), requiring publicity and a regular ceremony for the creation of the marital relation in England, was passed prior to the American Revolution, most of the original colonies, as well as the states which subsequently joined the Union, adopted the earlier policy of giving recognition to these informal, consensual marriages. The reason for this recognition can be seen in the character of the United States during its early years. The country was sparsely populated, the communities were few and far between, and the availability of persons authorized to solemnize marriage was limited. As late as 1931, a majority of the states still recognized common-law marriages. As of 1958, with the abolition of common-law marriage in Indiana in 1957, only eighteen states and the District of Columbia still recognized them. It is generally felt that the factors which led to the recognition of common-law marriage are no longer existent. For a complete history of the common-law marriage see *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, 67-72, 161 Eng. Rep. 665, 668-72 (1811). See also *Keezer, Marriage and Divorce* § 28 (3d ed. 1946); 2 *Pollack and Maitland, History of English Law* 369-74 (2d ed. 1923); 1 *Vernier, American Family Laws* § 26 at 102-10 (1931).

<sup>23</sup>*Meister v. Moore*, 96 U.S. 76, 81 (1877).



statement: "The want of form, or the lack of ceremonial rites, does not impair a marriage contract, in cases where it is entered into from good motives and with an intention to contract a present marriage, and is followed by an open acknowledgement of the marital relation."<sup>24</sup> In a later decision,<sup>25</sup> the Indiana Supreme Court, in referring to the importance of cohabitation in the contracting of a marriage *per verba de praesenti*, stated that "cohabitation does not of itself constitute a common-law marriage. It is merely *evidence of marriage* . . ."<sup>26</sup> If cohabitation is merely "*evidence of marriage*," a requirement of five years open and notorious cohabitation does not appear to be based upon sound principles, for "at each particular moment in the existence of a person, he must either be married or single; there is no intermediate position."<sup>27</sup> In enacting a provision requiring a five year period of cohabitation, the Indiana Legislature did not intend to redefine common-law marriage.<sup>28</sup> Instead it intended to introduce some fixed standard of measurement into the proving of a common-law marriage entitling the surviving spouse to recover under the Workmen's Compensation Act.<sup>29</sup> In fixing a standard it appears that the legislature was somewhat overzealous. While it is quite true that there often are great difficulties involved in proving the existence of common-law marriages and that occasionally false claims may go undetected, public policy does not seem to require the barring of all claims, whether fraudulent or honest, based upon such marriages where the period of cohabitation is less than five years. "The institution and maintenance of suits for false claims is recognized, but to what extent in comparison with honest ones is not a matter of judicial notice; nor is it a matter of such notice in what measure false claims are successful. *To hold that all honest claims should be barred merely because otherwise some dishonest ones will prevail is not enough to make out a case of public policy.*"<sup>30</sup>

While it appears that the effect of section 40-1403a leaves much to be desired, and that the stated purpose of this statute has been

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<sup>24</sup>101 Ind. 129 (1884), cited with approval in *Schilling v. Parsons*, 110 Ind. App. 52, 36 N.E.2d 958, 961 (1941).

<sup>25</sup>*Meehan v. Edward Valve & Mfg. Co.*, 65 Ind. App. 342, 117 N.E. 265 (1917).

<sup>26</sup>*Id.* at 266 (Emphasis added).

<sup>27</sup>*Bishop, Marriage, Divorce, and Separation* § 317 (1891).

<sup>28</sup>The five year requirement was not intended to modify the law on what constitutes a common law marriage. *Guevara v. Inland Steel Co.*, 120 Ind. App. 47, 88 N.E.2d 398, 401 (1949).

<sup>29</sup>See note 16 *supra*.

<sup>30</sup>*Chiuchiolio v. New England Wholesale Tailors*, 84 N.H. 329, 150 Atl. 540, 543 (1930). (Emphasis added).

overstepped, these observations cannot be made the basis for constitutional objection. There does, however, seem to be a constitutional objection to the section on the ground that it contains an unconstitutional classification. An excellent definition of what constitutes a valid classification was made by the Indiana Supreme Court in *Bedford Quarries Co. v. Bough*:

"The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand . . . Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class . . . Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification."<sup>31</sup>

To all appearances, the classification in section 40-1403a fails to comply with these criteria.

In order to facilitate the administration of its Workmen's Compensation Act, Indiana has created a classification based entirely upon the type and duration of a marriage, while generally no distinction is made on such a basis.<sup>32</sup> "In the United States there are no degrees or differences in marriage. The denial in many states of validity to a common-law marriage and the acceptance of that form by others still leaves unchanged the status once recognized of any union no matter how contracted. *A marriage in America is full and complete in every respect or it does not exist at all.*"<sup>33</sup> A wife is a wife, and a marriage is a marriage, and it is immaterial whether the relation is founded in ceremony or in mutual consent alone. Certainly the Indiana Legislature would not attempt to classify wives according to their height, their weight, or the color of their hair. It has classified them according to the type and duration of their marriages, which seems just as capricious a classification. If common-law marriages are recognized, as they were in Indiana until 1957, then a wife's common-law marriage ought to have all the incidents of a ceremonial marriage. Once common-law marriages are recognized, there is no rational basis for dis-

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<sup>31</sup>168 Ind. 671, 80 N.E. 529 (1907).

<sup>32</sup>An extensive search of the Ind. Ann. Stat. (Burns' 1952 Replacement) fails to reveal any similar distinction being drawn in the titles dealing with decedent estates, descent, husband and wife, wills, bequests and devise, or probate.

<sup>33</sup>Black, Common Law Marriages, 2 U. Cinc. L. Rev. 113, 127 (1928). (Emphasis added). In this article Mr. Black makes a spirited defense of common-law marriage, and presents a comprehensive summary of the attitude toward these marriages in 1928.

tinguishing between a common-law marriage of four years, ten months, and nineteen days, and one of five years. In fact, there is no rational basis for distinguishing between a common-law marriage and a ceremonial marriage of the same duration. No period of cohabitation is required before a wife whose marriage is founded in ceremony is entitled to recover under the Act.<sup>34</sup> To require a period of cohabitation of a common-law wife is clearly prejudicial to her interests. A right should not be afforded one wife and denied another wife when their marriages are equally valid,<sup>35</sup> their children are equally legitimate,<sup>36</sup> and they equally inherit from their deceased spouses.<sup>37</sup> The Indiana Legislature has taken one natural class, composed of ceremonial and common-law wives, and split it into two parts. It has then designated these two parts as two classes, and proceeded to legislate against one of these parts. If the Legislature looked upon common-law marriages with great disfavor and felt they were a fruitful source of perjury and fraud,<sup>38</sup> then it should have abolished them in 1947 instead of attempting to regulate them through an apparently unconstitutional classification. It is clearly within the power of the Indiana Legislature to abolish common-law marriage,<sup>39</sup> but it is not within its power to establish arbitrary and discriminatory marriage classifications.

Thus it appears that the provisions of section 40-1403a of the Indiana Workmen's Compensation Act are open to question on several grounds. The effect of the classification made in this section is clearly *contra* to the generally accepted purpose of workmen's compensation acts. While the difficulty of proof may mean that false claimants can be successful, this is not a sufficient reason to justify

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<sup>34</sup>Ind. Ann. Stat. § 40-1403a (Burns' 1952 Replacement).

<sup>35</sup>"It is also held that the contracting parties to a common-law marriage are husband and wife as fully and to the same effect and extent as if there had been a statutory and ceremonial marriage . . ." *Dunlop v. Dunlop*, 101 Ind. App. 43, 198 N.E. 95, 98 (1935).

<sup>36</sup>"The parties to such marriage [common-law] are husband and wife and their legal status is that of married persons; their children are legitimate . . ." *Baker v. Mays & Mays*, 199 S.W.2d 279, 284 (Tex. Civ. App. 1946). Accord, *Monroe v. Middle Atl. Transp. Co.*, 85 N.E.2d 801 (Ohio Ct. App. 1949); *Umbenhowe v. Labus*, 85 Ohio St. 238, 97 N.E. 832 (1912).

<sup>37</sup>See note 32 *supra*.

<sup>38</sup>*Anderson v. Anderson*, 235 Ind. 113, 131 N.E.2d 301, 305 (1956), adopting the language in *In re Dittman's Estate*, 115 N.E.2d 125, 130 (Ind. App. Ct. 1953).

<sup>39</sup>The marriage relationship, regardless of whether the source of such relationship was common-law or ceremonial, is of such vital concern to society, the public, and the state, that it is subject to legislative control and regulation. *Pry v. Pry*, 225 Ind. 458, 75 N.E.2d 909, 913 (1947); *Sweigart v. State*, 213 Ind. 157, 12 N.E.2d 134, 138 (1938); *Wiley v. Wiley*, 75 Ind. App. 456, 123 N.E. 252, 255 (1919).

arbitrary and unreasonable classifications. In light of the fact that common-law marriages have recently been abolished in Indiana, it seems safe to infer that the decision in the final appeal would have been different if the law of Indiana had not been changed prior to the rendering of this decision.<sup>40</sup>

WILLIAM H. ABELOFF

### SIGNIFICANCE OF PUBERTY IN NONAGE MARRIAGES

Statutes in every state have raised the age required at common law to contract a valid marriage.<sup>1</sup> Originally this was the age of puberty, 12 years for the female and 14 years for the male.<sup>2</sup> By thus raising the required age, legislatures have created a gap between the age at which the parties are deemed to have physical capacity to consummate a marriage and the age required by statute for legal capacity to contract a valid marriage. A nonage marriage in which one of the parties has reached the age of puberty but not the age required by statute could be held to be either: (1) valid, (2) voidable, (3) or void.

Arkansas has had difficulty in dealing with this type of marriage. *State v. Graves*,<sup>3</sup> the most recent Arkansas case involving nonage marriages, points up this problem. An Arkansas statute provides that males of the age of 18 and females of the age of 16 years "shall be capable in law of contracting marriage; if under these ages, their marriages shall be absolutely void."<sup>4</sup> Harold Graves, 17 years of age, and Sandra Spearman, 13 years of age, both residents of Arkansas, went to Mississippi to get married. They were accompanied by the parents of the girl and the father of the boy. After the ceremony, the group returned to Arkansas, where the defendant and Sandra had lived as man and wife for a period of four days when an attendance officer at Sandra's school obtained a warrant charging Harold and Mr. and

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<sup>40</sup>*Union Trust Co. v. Grosman*, 245 U.S. 412, 417 (1918).

<sup>1</sup>*Vernier*, American Family Laws § 29, at 116 (1931). This section says that 11 jurisdictions retain the common law age requirement. However, in the 1938 supplement to this treatise, § 29 says that 6 of the 11 states, have, by statute, raised the age required at common law. *Vernier*, American Family Laws § 29 (Supp. 1938). At the time of this writing the remaining 5 states, adhering to the common law rule in 1938, have raised the age required to contract unconditionally a valid marriage. Idaho Code § 32-202 (1947); Me. Rev. Stat. Ann. ch. 166, § 5 (1954); Md. Ann. Code art. 62, § 9 (1957); Mass. Ann. Laws ch. 207, § 7 (1955); Miss. Code Ann. § 460 (1942).

<sup>2</sup>*Keezer*, Marriage and Divorce §145 at 203 (3d ed. 1946).

<sup>3</sup>307 S.W.2d 545 (Ark. 1957).

<sup>4</sup>Ark. Stat. Ann. § 55-102 (1947).

Mrs. Spearman with contributing to the delinquency of a minor.<sup>5</sup> The prosecution reasoned that the Mississippi marriage was void, and thus Sandra had been delinquent because of her cohabitation with the defendant. In deciding the guilt or innocence of the defendant, the court necessarily determined the validity of the marriage. The court held the marriage was not void, stating, "We have no statute which provides that marriages such as the one involved here... are void in the state of Arkansas."<sup>6</sup> This decision was based on the conflict of laws principle that a marriage valid where performed is valid everywhere.<sup>7</sup> As a result of this determination that the marriage was not void, the charge of contributory delinquency against the defendant was dismissed. Chief Judge Harris wrote a strong dissent saying that if a marriage by parties under the statutory age requirement was "absolutely void," it could not be valid under any circumstances.

Prior to 1941 the Arkansas statute provided that nonage marriages "are void."<sup>8</sup> In cases involving nonage marriages the court, however, interpreted this statute to mean such marriages are voidable only, not void *ab initio*.<sup>9</sup> In 1941 the legislature amended the statute by inserting the word "absolutely" before the word "void."<sup>10</sup> In a 1944 case this amendment, though mentioned in the court's opinion, was ignored in determining a nonage marriage to be voidable only and not void *ab initio*.<sup>11</sup>

In 1945 the case of *Ragan v. Cox*<sup>12</sup> came before the Arkansas court. This case involved the marriage of a twelve-year-old girl to her fifty-two-year-old uncle. While holding this marriage void on the ground that it was incestuous, the court, in dictum, said that on the ground of nonage alone the marriage would not be void, but merely voidable.<sup>13</sup> On remand evidence was introduced showing the man was not the girl's uncle, but her great-uncle. Therefore the parties to the marriage were not within the degree of relationship prohibited by the statute.

<sup>5</sup>The opinion gives no explanation as to why D. H. Graves, defendant's father, who also accompanied the group to Mississippi and consented to the marriage, was not included in the warrant.

<sup>6</sup>307 S.W.2d at 550.

<sup>7</sup>Restatement, Conflict of Laws § 121 (1934).

<sup>8</sup>Ark. Rev. Stat. ch. 94, § 2 (1837) as cited in 307 S.W.2d at 549.

<sup>9</sup>*Witherington v. Witherington*, 200 Ark. 802, 141 S.W.2d 30 (1940); *Kibler v. Kibler*, 180 Ark. 1152, 24 S.W.2d 867 (1930).

<sup>10</sup>Ark. Acts 1941, Act 32.

<sup>11</sup>*Hood v. Hood*, 206 Ark. 1057, 178 S.W. 670 (1944).

<sup>12</sup>208 Ark. 809, 187 S.W.2d 874 (1945).

<sup>13</sup>*Id.* at 876.

Because of this new evidence the Supreme Court on the second appeal was unable to hold the marriage void on the ground of incest, and therefore held it void on the ground of nonage.<sup>14</sup> In the opinion the court stated, "If we are at liberty to say that a man who has passed the half century mark may fraudulently procure a marriage license, and in consummation of lust induce a justice of the peace to intone the phrases that in more favorable circumstances would result in marriage—if this can be done with a twelve-year-old girl, it can be carried still further and serve to unite an octogenarian with a female child appropriated from the play room . . ."<sup>15</sup> This language seems to indicate that the peculiar facts of the case influenced the court to hold this marriage void because the relationship was shocking to the court's conscience. In the *Ragan* case the attack on the marriage was at the instance of the nonage party. The fact that a nonage party may attack a void or voidable marriage and a party who is of the age of legal consent may only attack a void marriage<sup>16</sup> leaves some question as to whether the court would have held the marriage void if the nonage party was asserting the validity of the marriage. This is evidenced by the following language of the court: "In the circumstances of this case the pretended marriage between W. A. and Louise Ragan was—certainly as to the appellee [great-uncle] . . . a complete nullity. What effect the ceremony might have had upon any marriage status claimed by Louise does not enter into the discussion, because at her instance the records were purged."<sup>17</sup> Therefore, it cannot be said with certainty whether the court determined this marriage to be void or merely voidable.

The dissent in *State v. Graves* appears to be arguing for the inclusion of nonage marriages within section 132(d) of the *Restatement of the Conflict of Laws* which sets out an exception to the principle that a marriage valid where performed is valid everywhere by invalidating a "marriage of a domiciliary which a statute at the domicil makes void though celebrated in another state."<sup>18</sup> Adoption of the view proposed by the dissent would have the same effect as

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<sup>14</sup>*Ragan v. Cox*, 210 Ark. 152, 194 S.W.2d 681 (1946).

<sup>15</sup>*Id.* at 685.

<sup>16</sup>Keezer, *Marriage and Divorce* § 144 (3d ed. 1946).

<sup>17</sup>194 S.W.2d at 685.

<sup>18</sup>Restatement, *Conflict of Laws* § 132(d) (1934). The dissenting judge states: "I feel that this Court should go further and add a fifth exception, namely, 'marriage of a domiciliary which the statute at the domicile makes void.'" Though the dissent states that "a fifth exception" should be added, he uses language that is the same as that of the fourth exception as stated in the Restatement, except for omitting the phrase, "though celebrated in another state." 307 S.W.2d at 551.

legislative adoption of a marriage evasion statute. Such a statute invalidates a marriage of a domiciliary contracted without the state for the purpose of evading the laws of domicile.<sup>19</sup> It seems to be going too far to say the legislature intended the words "absolutely void" to have the effect of a marriage evasion statute when such a statute could have as easily been enacted.

If it had been the intent of the legislature to make all nonage marriages void *ab initio*, instead of merely voidable, then it seems pointless for the state to have another statute providing for annulment on the ground of want of age.<sup>20</sup> The wording of other statutes also leaves doubt as to what the legislature intended by "absolutely void." The statute dealing with miscegenation marriages provides that such marriages are "*illegal and void*."<sup>21</sup> The statute dealing with marriages between persons within prohibited degrees of consanguinity provides that such marriages are "*incestuous and absolutely void*."<sup>22</sup> Miscegenation and incestuous marriages fall within the recognized exceptions to the conflict of laws principle that a marriage valid where performed is valid everywhere.<sup>23</sup> It seems the legislature would have characterized nonage marriages with similar language, i.e., "illegal and absolutely void," so as to show a strong public policy against such marriages if it intended that these marriages should be void *ab initio* as are miscegenation and incestuous marriages.

The majority opinion in *State v. Graves*, in determining that the marriage was not void, is consonant with prior decisions of the Arkansas courts,<sup>24</sup> with the exception of the second appeal in the *Regan* case.<sup>25</sup> The decision also seems to be in accord with a majority of other jurisdictions.<sup>26</sup> Although all states have raised the common law

<sup>19</sup>Restatement, Conflict of Laws § 132, comment c (1934). Massachusetts has a typical marriage evasion act that provides, "If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth." Mass. Ann. Laws Ch. 207, § 10 (1955).

<sup>20</sup>Ark. Stat. Ann. § 55-106 (1947).

<sup>21</sup>Ark. Stat. Ann. § 55-104 (1947). (Emphasis added).

<sup>22</sup>Ark. Stat. Ann. § 55-103 (1947). (Emphasis added).

<sup>23</sup>Restatement, Conflict of Laws §§ 121, 132 (1934).

<sup>24</sup>Ragan v. Cox, 208 Ark. 809, 187 S.W.2d 874 (1945); Hood v. Hood, 206 Ark. 1057, 178 S.W.2d 670 (1944); Witherington v. Witherington, 200 Ark. 802, 141 S.W.2d 30 (1940); Kibler v. Kibler, 180 Ark. 1152, 24 S.W.2d 867 (1930).

<sup>25</sup>194 S.W.2d at 681.

<sup>26</sup>Taylor v. Taylor, 249 Ala. 419, 31 So. 2d 579 (1947); Smith v. Smith, 205 Ala. 502, 88 So. 577 (1921); People v. Souleotes, 26 Cal. App. 309, 146 Pac. 903 (1915);

age requirements,<sup>27</sup> many courts hold marriages by parties under the statutory age voidable rather than void.<sup>28</sup> Only three of the seventeen jurisdictions searched follow the strict statutory interpretation of minimum age requirements, advocated by the dissent in the principal case.<sup>29</sup> These three jurisdictions, however, have raised the age limits only slightly.<sup>30</sup> For example, in *Hayes v. Hay*,<sup>31</sup> the Georgia court, by strictly construing the statute providing that a girl must be fourteen years of age to contract marriage,<sup>32</sup> held the marriage of a twelve-year-old girl to be void. New Hampshire has retained the common law age of 14 for males, while raising the age for females from 12 to 13.<sup>33</sup>

The so-called age of consent, as it existed at common law, was closely related to a person's physical capacity to enter into the marriage state. By raising this age, modern statutes have created an age of consent that is unrelated to physical development and rests solely on public policy as interpreted by the legislature. When persons who have reached the age of puberty, but not that of legal consent, nevertheless undertake to contract a marriage, what will be its effect? The answer the courts generally give is that the marriage is voidable. By interpreting such marriages as voidable, the courts have raised the age span at which a marriage was voidable at common law, [7-14 for

*In re Kemp*, 192 Misc. 267, 78 N.Y.S.2d 588 (Dom. Rel. Ct. N.Y. County 1948); *Anonymous v. Anonymous*, 176 Misc. 850, 29 N.Y.S.2d 331 (Dom. Rel. Ct. N.Y. County 1941); *Parks v. Parks*, 218 N.C. 245, 10 S.E.2d 807 (1940); *Sawyer v. Slack*, 196 N.C. 697, 146 S.E. 864 (1929); *Keith v. Pack*, 182 Tenn. 420, 187 S.W.2d 618 (1945); *Needham v. Needham*, 183 Va. 681, 33 S.E.2d 288 (1945); *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943).

<sup>27</sup>See note 1 *supra*.

<sup>28</sup>See note 24 *supra*. The requirement of parental consent for nonage parties will not be discussed in this article. For discussion of this issue see Kingsley, *The Law of Infants' Marriages*, 9 Vand. L. Rev. 593 (1956).

<sup>29</sup>*Hayes v. Hay*, 92 Ga. App. 88, 88 S.E.2d 306 (1955); *Mims v. Hardware Mut. Cas. Co.*, 82 Ga. App. 210, 60 S.E.2d 501 (1950); *Powell v. Powell*, 97 N.H. 301, 86 A.2d 331 (1952); *Ex parte Tucker*, 219 P.2d 245 (Okla. Crim. App. 1950); *Scott v. State*, 85 Okla. Crim. 213, 186 P.2d 336 (1947).

<sup>30</sup>The following states, by statute, have raised the age required of females at common law contract a valid marriage by 1, 2, and 3 years respectively: N.H. Rev. Laws ch. 338, § 4 (1942); Ga. Code tit. 53, § 102 (1933); Okla. Stat. tit. 43, § 3 (1951).

<sup>31</sup>92 Ga. App. 88, 88 S.E.2d 306 (1955).

<sup>32</sup>Ga. Code tit. 53, § 102 (1933).

<sup>33</sup>N.H. Rev. Laws ch. 338, § 4 (1942). There are some jurisdictions which hold a marriage involving parties above the common law age of consent but below the legal age of consent to be entirely valid. These jurisdictions, however, are in the minority. *Parton v. Hervey*, 67 Mass. (1 Gray) 119 (1854); *Hunt v. Hunt*, 172 Miss. 732, 161 So. 119 (1935); *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944); *State v. Sellers*, 140 S.C. 66, 134 S.E. 873 (1926).



the male and 7-12 for the female], and have relocated this span between the limits of the valid age of consent at common law, [14 for the male and 12 for the female] and the legal age of consent as set by statute.

SAMUEL L. BARE, III

### PARTITION DEED CANNOT CREATE TENANCY BY ENTIRETIES

A partition deed is an instrument whereby joint tenants<sup>1</sup> effect a division of land held in common, allotting to each party his portion in severalty. For example, where X deeds a tract of land to A and B, creating a joint tenancy or tenancy in common, or where X devises a tract to A and B, creating a coparcenary, and subsequently the parties want to finally determine their separate portions so that each may hold the fee of a designated tract, they may, if they can agree on the share of each,<sup>2</sup> achieve this end by partition deeds between themselves.<sup>3</sup>

When a partition deed between joint tenants joins as grantee the spouse of the tenant-grantee, the problem arises as to what estate is created. Normally, a deed whereby husband and wife take as joint grantees creates a form of concurrent estate, whether it be a tenancy in common,<sup>4</sup> a joint tenancy,<sup>5</sup> or a tenancy by entireties;<sup>6</sup> and in each instance the marital rights of a spouse without prior interest are enlarged, in the latter two estates to the extent of the right of survivorship.<sup>7</sup> But by the almost unanimous weight of authority, no such enlargement of marital rights is created by a partition deed joining as grantee a spouse with no prior interest.<sup>8</sup>

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<sup>1</sup>A generic term embracing, for the purpose of this comment, joint tenancies, tenancies in common, and coparcenaries.

<sup>2</sup>"Whenever persons interested in land as owners and cotenants cannot, by consent and agreement among themselves, make a division thereof... any one or more of them may apply for a partition by judicial proceedings—a compulsory partition,—which takes place without regard to the wishes of one or more of the owners." 40 Am. Jur. Partition § 27 (1942).

<sup>3</sup>*Michalski v. Kruszewski*, 330 Pa. 62, 198 Atl. 673 (1938).

<sup>4</sup>*McCallister v. Folden's Assignee*, 110 Ky. 732, 62 S.W. 538 (1901).

<sup>5</sup>*Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906).

<sup>6</sup>26 Am. Jur. Husband and Wife § 66 (1940).

<sup>7</sup>2 American Law of Property §§ 6.1, 6.6 (Casner ed. 1952).

<sup>8</sup>E.g., *Jelly v. Lamar*, 242 Mo. 44, 145 S.W. 799 (1912); *Snyder v. Elliot*, 171 Mo. 362, 71 S.W. 826 (1903); *Whitsett v. Wamack*, 159 Mo. 14, 59 S.W. 961 (1900); *Shull v. Cummings*, 174 Mo. App. 569, 161 S.W. 360 (1913); *Wood v. Wilder*, 222

The recent North Carolina case of *Smith v. Smith*<sup>9</sup> follows this prevailing view. Benjamin Smith owned a tract of land, and on his death he left as his heirs at law a widow, Minnie Smith, and two sons, John and Frank Smith. Frank Smith then conveyed all of his interest in the tract to his mother, with the result that she and John Smith held as tenants in common. On September 15, 1949, mutual deeds were executed between John Smith and his mother: one by John and his wife,<sup>10</sup> who conveyed a tract (unspecified in the record) to his mother; the other by Minnie Smith, who conveyed a tract (also unspecified in the record) to John and his wife, reserving a life estate to herself. The latter deed *recited* that it created a tenancy by the entirety. Nine years later John Smith's ex-wife, who had since remarried, sued for partition of the tract described in the deed from Minnie Smith, alleging that she and John Smith had held the land as tenants in common, subject to Minnie's life estate. The trial court assumed that the mutual deeds were partition deeds and held that as a result the deed which recited that it created an estate by entireties did not do so, in that an estate by entireties cannot be created by a partition deed which names as co-grantee the partition-grantee's spouse, where the spouse had no prior interest in the land. The court went on to say that this partition suit was prematurely brought because a portion of the land involved was subject to the life estate of Minnie Smith.

The Supreme Court of North Carolina remanded the case on two grounds: The trial court erred in treating the mutual deeds as partition deeds, because there was insufficient evidence to indicate such an intent by the parties. It also erred in holding that the suit was prematurely brought, because "the existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof . . ."<sup>11</sup>

The appellate court, however, concurred with the reasoning of

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N.C. 622, 24 S.E.2d 474 (1943); *Speas v. Woodhouse*, 162 N.C. 66, 77 S.E. 1000 (1913); *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908); *Harrington v. Rawls*, 131 N.C. 39, 42 S.E. 461 (1902); *Harrison v. Ray*, 108 N.C. 215, 12 S.E. 993 (1891); *Rhodes v. Peery*, 142 Ore. 165, 19 P.2d 418 (1933); *Holt v. Holt*, 185 Tenn. 1, 202 S.W.2d 650 (1947); *Cottrell v. Griffiths*, 108 Tenn. 191, 65 S.W. 397 (1901); *Foster v. Foster*, 153 Va. 636, 151 S.E. 157 (1930); *Yancey v. Radford*, 86 Va. 638, 10 S.E. 972 (1890).

<sup>9</sup>248 N.C. 194, 102 S.E.2d 868 (1958).

<sup>10</sup>In order to terminate the rights of the grantor's spouse, the grantor customarily has his spouse join with him in the conveyance. See 3 American Law of Property § 12.51 (Casner ed. 1952).

<sup>11</sup>248 N.C. 194, 102 S.E.2d 868, 872 (1958).

the trial court with regard to the aforementioned majority rule, notwithstanding the fact that the deed recited an intent to create an estate by entireties. The court said that "if it should be determined [at a new trial] the deeds are partition deeds, the petitioner would derive no title. 'Accordingly, a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create an estate by the entirety or enlarge the marital rights of the spouse as previously fixed by law.'"<sup>12</sup> Thus the court not only follows the majority rule, but seems to extend it by applying the rule in derogation of the grantor's intent as expressed in the deed.

In order to understand such a seemingly illogical result, some inquiry into the reasoning behind the prevailing view is necessary. By its very nature a partition deed does not really convey, strictly speaking, but merely operates to sever the unity of possession,<sup>13</sup> designate boundaries,<sup>14</sup> and adjust the rights of the interested parties to the possession;<sup>15</sup> it does not create new rights. The grantee does not take by the partition deed, but has already taken by the prior joint deed or will. The claimant spouse, unmentioned in the prior instrument, was intended to have no interest by the actual grantor. Therefore, the partition-grantor, who in effect merely releases his claim to a part, cannot now presume to create a nonexistent interest in the spouse. As a requisite to the creation of a tenancy by entireties, the parties must be jointly entitled as well as jointly named in the deed.<sup>16</sup> The intent of the grantor, in order to control, must be consistent with some rule of law.<sup>17</sup> An intent such as that expressed in the *Smith* case was reasoned to be in derogation of a rule of law, and hence no larger an estate was created than had the deed omitted the spouse's name entirely.<sup>18</sup>

An opposing view adopts the concept that a partition deed does in fact convey, and consequently such a deed should be governed by

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<sup>12</sup>Id. at 871.

<sup>13</sup>Foster v. Foster, 153 Va. 636, 151 S.E. 157 (1930).

<sup>14</sup>Palmer v. Alexander, 162 Mo. 127, 62 S.W. 691 (1901).

<sup>15</sup>Harrison v. Ray, 108 N.C. 215, 12 S.E. 993 (1891).

<sup>16</sup>Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910, 911 (1908).

<sup>17</sup>In re Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). See also 161 A.L.R. 462 (1946).

<sup>18</sup>This rule has been applied even where a decedent's heirs, to effect a partition, executed deeds to his widow, who simultaneously executed deeds back to each heir for his share of the land, the deed for a daughter's share, at her direction, being made to herself and her husband; such husband acquired no title as tenant by the entirety. Powell v. Powell, 267 Mo. 117, 183 S.W. 625 (1916).

principles applicable to ordinary conveyances. This view finds expression more in theory than in law, but it is nevertheless advocated by two early cases.

An 1869 Iowa case<sup>19</sup> adopted this view with regard to a judgment of partition. The court said that if the estate created would have been one by entireties, then the fact that it arose out of a partition proceeding would not preclude this result.<sup>20</sup> The same view was followed by New York in *Wright v. Sadler*,<sup>21</sup> wherein a partition deed naming as grantee a coparcener and spouse was held to create a tenancy by entireties.<sup>22</sup> The New York court used the persuasive argument that if a simple partition, wherein a spouse with no prior interest would gain only dower or curtesy rights, was intended, then that end was attainable by naming the coparcener alone as grantee. But where the grant was in express terms to both spouses, the court found that something *more* was intended: that is, the vesting of a concurrent estate in the coparcener's wife.<sup>23</sup>

However persuasive this argument may seem, it is said to pale in the light of the true nature of a partition proceeding.<sup>24</sup> The partition-grantee already has what the deed "conveys"; the deed merely describes it. A named grantee with no prior interest could no more take as a tenant by entirety than could a new bride claim an estate by entirety in land owned by her husband for ten years prior to the marriage. The husband took under the conveyance ten years ago; the partition-grantee took under a conveyance some time before the parties decided to partition—a conveyance from which the spouse's name was absent.

There appears to be a third view, which, if it does not frontally attack the majority view, at least casts considerable doubt on the soundness of the *Smith* decision. This view facilitates the creation of an estate by entireties and is harmonious with the current trend toward streamlining the law and overlooking technicalities which contradict a clearly expressed and lawful intent. This trend finds ample

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<sup>19</sup>*Hoffman v. Stigers*, 28 Iowa 302 (1869).

<sup>20</sup>28 Iowa 302, 304 (1869). The case is distinguishable, however, in that both spouses had a prior interest, and is valuable only for its implication that a partition deed is equivalent to an ordinary conveyance.

<sup>21</sup>20 N.Y. 320 (1859).

<sup>22</sup>One spouse, however, was an alien who failed to file a deposition required by statute alleging his intent to become a United States citizen. The court held that on the death of his spouse, the estate vested in him nevertheless, subject to the right of escheat in the state.

<sup>23</sup>20 N.Y. 320, 323 (1859).

<sup>24</sup>See note 8 *supra*.

expression in situations where one party owns land and wishes to confer on his spouse the right of survivorship through a tenancy by entireties. The most orthodox method for achieving this end has been for the grantor to convey to a third person, who in turn re-conveys the land to the husband and wife as joint grantees.<sup>25</sup> The courts do not hesitate to indulge in this obvious fiction, in order to carry out the parties' intent. Some jurisdictions go further and allow a party to convey to himself and his spouse in a joint deed, thereby creating an estate by entireties.<sup>26</sup> These courts rationalize the maxim that one cannot convey to himself, by declaring that the spouse merely conveyed "to a legal unity or entity which was the consolidation of himself and another."<sup>27</sup> Other jurisdictions go still further in streamlining this phase of the law by allowing the creation of estates by entirety by one spouse's conveyance of a one-half undivided interest in his land to the other, where his intent is clear,<sup>28</sup> or simply by allowing one spouse to convey the whole to the other, where the intent is likewise clear.<sup>29</sup> Such drastic departures from the common law are justifiable; they are pursuant to a just and legitimate end.<sup>30</sup>

There is no reason why this view should not be applied to partition deeds, *a fortiori* to partition deeds which express an intent to create estates by entirety. When one considers the scope and purpose of reform doctrines which abolish needless technicalities, the injustice of the *Smith* case becomes manifest. Minnie Smith intended to create a tenancy by the entireties in her son and his wife; her intent was both patent and lawful. The estate, however, was never vested in the spouses. The reason was that a sweeping proposition of law—one

<sup>25</sup>Davis v. Clark, 26 Ind. 424 (1866); Taul v. Campbell, 7 Yerg. 319 (Tenn. 1835); Kratovil, Real Estate Law § 445 (1946); 26 Cornell L.Q. 508 (1941).

<sup>26</sup>Boehrer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930); Coon v. Campbell, 138 Misc. 567, 240 N.Y. Supp. 772 (Sup. Ct. 1930); In re Vogelsang's Estate, 122 Misc. 599, 203 N.Y. Supp. 364 (Surr. Ct. 1924); Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626 (1926); In re Vandergriff's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932). But see Stone v. Culver, 286 Mich. 263, 282 N.W. 142 (1938); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915); Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911).

<sup>27</sup>In re Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181, 185 (1915) (dissenting opinion). The dissent in this case actually represents the majority view regarding the ability of the husband to create a tenancy by the entirety by conveying to himself and his wife. It has since been adopted as the law in New York. See In re Lyon's Estate, 233 N.Y. 208, 135 N.E. 247 (1922). See also the New York cases cited in note 26 *supra*.

<sup>28</sup>Runions v. Runions, 186 Tenn. 25, 207 S.W.2d 1016 (1948). See 21 Tenn. L. Rev. 339 (1950).

<sup>29</sup>1 Fla. L. Rev. 433 (1948).

<sup>30</sup>2 Tiffany, Real Property § 432 (3d ed. 1939).

which never contemplated a partition deed expressly purporting to create a tenancy by entireties—said that a partition deed is incapable of conferring an interest on someone who, although named, had no prior interest. To apply this rule to these facts is to lose sight of the goal of litigation and to become enslaved by strict stare decisis. If John Smith had conveyed the tract, once it had been allotted to him, to a third party who had reconveyed to the spouses as a unity, Smith's mother's intent would have been carried out. But more important, if the court had followed the reasoning of the courts which allow the creation of estates by the entirety by (1) conveying to one's self and one's spouse by a joint deed, (2) conveying a one-half undivided interest to one's spouse, where the intent is clear, or (3) merely conveying the whole to one's spouse, where the intent is likewise clear,<sup>31</sup> the intent of his mother would have been effectuated. In ignoring the devices used by the courts to facilitate the creation of estates by the entirety and in adhering adamantly to a rule which, when stretched to fit the facts of the principal case, leads to an unjust result, the court sacrificed substance for form.

JOSEPH L. LYLE, JR.

#### RELEVANCY OF CHARACTER EVIDENCE ON DAMAGES FOR WRONGFUL DEATH

Plaintiff's decedent was killed as a result of an accident caused by the negligence of the defendant. Plaintiff, a daughter of the deceased, qualified as administratrix of the estate and brought an action for wrongful death in the case of *Basham v. Terry*.<sup>1</sup> The plaintiff's evidence, bearing upon the measure of damages, showed that prior to the accident the decedent, being retired from employment, had helped with the laundering and cooking at home, had given considerable time to gardening for the family, and had visited his wife and son in nearby institutions in which they were undergoing treatment.

The defendant then sought to introduce evidence in mitigation of damages tending to show the conduct, habits, and family relations of the deceased. Through cross-examination of the plaintiff, another daughter, and the widow of the deceased, the defendant attempted to

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<sup>31</sup>See notes 26, 28 and 29 *supra* and accompanying text.

<sup>1</sup>199 Va. 817, 102 S.E.2d 285 (1958).

prove that the deceased was "accustomed to doing some drinking . . ."<sup>2</sup> Further, through the testimony of a clerk of court, the defendant undertook to introduce evidence that on two occasions the plaintiff and the wife of the deceased had sworn out warrants against the deceased charging him with physical assault upon the wife. To all of this, counsel for the plaintiff objected: "Your Honor, I take the position that any such alleged evidence of his being a worthless bum is irrelevant in a case of this kind."<sup>3</sup> The trial court sustained the objection of plaintiff's counsel and excluded the defendant's evidence: "At this stage of the record, the Court thinks the matter has not been placed in issue."<sup>4</sup> Judgment against the defendant was entered in the amount of the statutory maximum, \$25,000.<sup>5</sup>

The Virginia Supreme Court of Appeals reversed the trial court and remanded the case for a new trial.<sup>6</sup> In the opinion, the court reiterated its previous holdings that a jury, in ascertaining damages for wrongful death, may take into consideration the beneficiaries' loss of the decedent's care, attention, and society and may award additional sums for solace and comfort for the sorrow, suffering, and mental anguish occasioned by the death.<sup>7</sup> The court held that the excluded evidence was clearly relevant as revealing the extent of these elements of damage.<sup>8</sup>

<sup>2</sup>Administratrix was questioned by defendant's counsel and answered as follows:

"Q. As a matter of fact, Miss Terry, your father had been accustomed to doing some drinking, hadn't he?

"A. Yes, sir."

Id. at 289.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>The statutory maximum has since been raised to \$30,000. Va. Code Ann. § 8-636 (Supp. 1958).

<sup>6</sup>Basham v. Terry, 199 Va. 817, 102 S.E.2d 285 (1958). The sole ground for reversal was the prejudicial result of the trial court's erroneous refusal to admit the evidence of the character of the deceased. The court found no error in the trial court's refusal to instruct on the possible contributory negligence of the deceased—the other ground upon which the defendant had sought reversal.

<sup>7</sup>E.g., Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955); Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); Ratcliffe v. McDonald's Adm'r, 123 Va. 871, 97 S.E. 307 (1918); Chesapeake & O. Ry. v. Ghee's Adm'r, 110 Va. 527, 66 S.E. 826 (1910); Pocahontas Collieries Co. v. Rukas' Adm'r, 104 Va. 278, 51 S.E. 449 (1905); Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896); Baltimore & O.R.R. v. Noell's Adm'r, 73 Va. (32 Gratt.) 394 (1879); Matthews v. Warner's Adm'r, 70 Va. (29 Gratt.) 570 (1877). See generally 5 Michie's Jurisprudence of Va. & W. Va. Death by Wrongful Act § 14 (1949).

<sup>8</sup>The court further stated that while the two criminal warrants sworn out against the decedent were somewhat remote, if the warrants had been tendered they

The basis of relevancy of the excluded character evidence in the above case is clear. The approach taken by the plaintiff's counsel and the reluctance of the trial court to admit the evidence is probably indicative of a widespread misconception that evidence of a party's character traits or habits is not admissible even though in fact it may bear directly on an issue in the case. Such a misconception must have its basis in the well-recognized rule that evidence of a party's character as an indication of his conduct on a specific occasion is normally not admissible.<sup>9</sup> For example, in an action for injuries sustained as a result of an automobile accident, evidence of prior convictions of the plaintiff for traffic violations would not be admissible as tending to show contributory negligence on the part of the plaintiff, because of the unfair prejudice, and possible unjust condemnation, which such evidence might induce.<sup>10</sup> Consequently, even though character evidence may have some basis of relevancy, it is held inadmissible because it is believed that the usefulness of the evidence is greatly outweighed by the undue prejudice and confusion which might result in the minds of the jurors.<sup>11</sup>

It has long been recognized, however, that where evidence of certain character traits or habits has a substantial independent basis of

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should have been admitted in evidence to show the true relationship between the deceased and his wife. *Basham v. Terry*, 199 Va. 817, 102 S.E.2d 285, 291 (1958).

<sup>9</sup>1 Wigmore, Evidence § 64 (3d ed. 1940).

<sup>10</sup>*Nesbit v. Cumberland Contracting Co.*, 196 Md. 36, 75 A.2d 339, 341 (1950). Wigmore says that "a fact may be logically relevant, and thus far admissible, and yet be excluded by reason of one of the auxiliary principles of policy . . . , particularly those of Confusion of Issues, Unfair Surprise, or Undue Prejudice." 1 Wigmore, Evidence § 29(a) (3d ed. 1940).

<sup>11</sup>As early as 1864 courts saw the evils of the admission of such evidence: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then perhaps serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature—both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors,—especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the one who first speaks to them on the subject, or to form their opinions upon the opinions of others. The introduction of such evidence in civil causes, wherever character is assailed, would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that might be easily manufactured—is liable to abuse and if in common use in the courts, as likely to mislead as to guide aright." *Wright v. McKee*, 37 Vt. 161, 163-64 (1864).



relevancy—i.e., where the traits or habits tend to prove or disprove some operative issue in the case other than the alleged conduct of the party on a specific occasion—the evidence may be admitted for that purpose. It appears that such character evidence is most frequently admitted upon issues relating to damages. For example, in a father's action for seduction of his daughter, damages are based primarily on the loss of the daughter's services. But in addition, the father is allowed to include compensation for the impairment of the family honor and for his own mental suffering; and evidence of the daughter's actual chaste character is relevant to establish the extent of his mental suffering.<sup>12</sup> By the same reasoning, character evidence is admissible in actions for criminal conversation, alienation of affections,<sup>13</sup> indecent assault,<sup>14</sup> and breach of promise to marry.<sup>15</sup>

The *Basham* case is illustrative of another action where evidence of character is admissible upon issues relating to damages, that is, the action for wrongful death.<sup>16</sup> Under the Virginia rule of damages for wrongful death, which permits damages to be recovered for loss of companionship and solace, the independent basis of relevancy for the admission of character evidence is strong and should present no difficulty. In fact, under the Virginia rule, it seems that almost any element of character might be relevant and admissible as bearing on the loss of companionship and solace. However, the Virginia measure of damages for wrongful death is almost unique. Only three other states<sup>17</sup> expressly allow recovery for sentimental losses.<sup>18</sup>

<sup>12</sup>1 Wigmore, Evidence § 210 (3d ed. 1940).

<sup>13</sup>The actual bad character or conduct of a plaintiff may serve in mitigation of damages inasmuch as the loss of his wife's virtue can mean little to a person of his behaviour. Id. § 75.

<sup>14</sup>In a civil action for assault, where the assault is claimed to have been made for indecent purposes, the actual chaste character of the woman is material as affecting the extent of the injury to her feelings. Id. § 212.

<sup>15</sup>Evidence of the unchaste character of the promisee of marriage is admissible, for the disgrace of the promisee would naturally be less or lacking if she were already unchaste. Id. § 213.

<sup>16</sup>Wigmore suggests that evidence of character may be admissible in an action for wrongful death if it can be shown that the evidence sought to be admitted is material to the inquiry of the measure of damages: "[I]t would seem that the particular bad acts of a deceased person would be receivable to evidence his moral character, so far as that character might be material in estimating the damages payable to next of kin in an action for loss of support due to death by wrongful act." Id. § 210(a).

<sup>17</sup>Louisiana, South Carolina, and West Virginia appear to be the only states which adopt the Virginia measure of damages. McCormick, Damages § 99 nn. 62 and 65 (1935); 16 Am. Jur. Death § 177 n. 3 (1938); Annot., 74 A.L.R. 11 (1931).

<sup>18</sup>"Sentimental losses" is the term adopted in this comment to replace loss of the decedent's care, attention, and society and damages for the beneficiaries' sorrow, suffering, and mental anguish occasioned by the death.

In the majority of jurisdictions recovery of damages for sentimental loss is rejected, and recovery is limited to the value of the pecuniary interest that the beneficiaries had in the life of the deceased: the present value of the net earnings which the deceased would have accumulated had he lived his normal life expectancy.<sup>19</sup> It would seem that in these states it would be very difficult to overcome the reluctance of the court to admit character evidence and to establish an independent basis of relevancy upon which character evidence might be admitted. The logical basis of relevancy of this evidence would be in reference to the decedent's probable gross income, living expenses, or similar pecuniary items. Surprisingly few cases have considered the issue of admissibility of character evidence in this context, but these same cases have generally allowed such evidence without specifying the basis of relevancy.<sup>20</sup>

In the North Carolina case of *Hanks v. Norfolk & W. Ry.*,<sup>21</sup> the defendant was permitted to introduce evidence that the decedent had

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<sup>19</sup>The pecuniary relief afforded by the statutes of the various states which govern wrongful death are of two general types:

(1) Damages based upon loss of contribution to the enumerated relatives determined by the present worth of the contributions and support which the deceased probably would have given to the survivors or beneficiaries had he lived. McCormick, *Damages* § 98 (1935); *Developments in the Law—Damages—1935-1947*, 61 *Harv. L. Rev.* 113, 167 (1947).

(2) Damages based on the loss to the estate of the deceased. These damages are determined in some jurisdictions by the present value of the decedent's probable future earnings less his probable personal expenses. In other states the damages are what the deceased would have accumulated or saved out of his earnings, deducting all probable expenditures. In a few jurisdictions the estate may recover the deceased's total probable earnings with no deductions for expenses. *Developments in the Law—Damages—1935-1947*, supra.

<sup>20</sup>*Taylor v. Western Pac. R.R.*, 45 *Cal.* 323, 334 (1873) (evidence of education, sobriety, and economy admissible to show greater earning capacity than that of an uneducated, drunken spendthrift); *McDonald v. Price*, 80 *Cal. App.* 2d 150, 181 P.2d 115, 116 (1947) (evidence of habitual intemperance and gambling admissible as showing value of decedent's life to his family); *Pell v. Herbert*, 33 *Cal. App.* 730, 166 *Pac.* 386, 387 (1917) (evidence of dissolute and unthrifty habits admissible as measure of damages); *Townsend v. Armstrong*, 220 *Iowa* 396, 260 *N.W.* 17, 20 (1935) (evidence of drunkenness admissible to show effect on earning capacity); *Holmberg v. Murphy*, 167 *Minn.* 232, 208 *N.W.* 808, 809 (1926) (evidence of unserved jail term admissible as bearing upon amount of pecuniary loss); *Wolters v. Chicago & A. Ry.*, 193 *S.W.* 877, 879 (Kansas City Ct. App. 1917) (evidence of habitual sobriety admissible to aid in determining pecuniary loss); *Craig v. Boston & Me. R.R.*, 92 *N.H.* 408, 32 *A.2d* 316, 320 (1943) (evidence of lewd and lascivious conduct admissible as bearing upon amount of probable contribution to children); *Umphrey v. Deery*, 78 *N.D.* 211, 48 *N.W.2d* 897, 909 (1951) (evidence of industry, sobriety and trustworthiness admissible to show substantial pecuniary loss); *Fleming v. City of Seattle*, 45 *Wash.* 2d 477, 275 *P.2d* 904, 910 (1954) (evidence of habit of intoxication admissible to show deceased was less valuable to family).

<sup>21</sup>230 *N.C.* 179, 52 *S.E.2d* 717 (1949).

previously entered a plea of guilty to a charge of nonsupport of his two minor children. The court said that the evidence "showed the neglect and disregard of a parent for his children which had necessarily continued for sometime before he was hailed into court."<sup>22</sup> That statement was made by a court in a state which purports to have as the measure of damages "the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual and ordinary expenses from the probable gross income...based upon his life expectancy."<sup>23</sup> It seems that this evidence is quite minimal in its effect on the deceased's gross income or on his living expenses, if indeed it is relevant at all. It is rather difficult to understand how the decedent's treatment of his family might reduce his income or increase his expenses. Such evidence might have a relevancy to the amount of the decedent's net income which he would have given to the beneficiaries, but this is not a part of the measure of recovery in North Carolina.

In most states the measure of damages for wrongful death, although limited to pecuniary loss, is not governed by such a crystallized formula as North Carolina has laid down. In these states some basis for admission of character evidence has been found. A Washington court<sup>24</sup> admitted evidence tending to show a habit of drinking intoxicants in mitigation of damages because "such a habit tends to lower a man's earning capacity, to shorten his expectancy of life, to impair his usefulness as a father, and to lessen his protection and support of his family."<sup>25</sup> An Iowa court<sup>26</sup> permitted the introduction of evidence of sober and industrious habits of a deceased because the evidence tended to show the value of the services of the decedent and the loss to his estate caused by his death. A California court<sup>27</sup> held the same type of evidence was relevant as showing "the extent of his probable usefulness to his beneficiaries."<sup>28</sup>

Admitting that there is some basis of relevancy for this evidence of character, it seems to be so slender that some attempt should have been made by these courts to rationalize the general rule of evidence which excludes similar evidence when introduced to prove conduct on a specific occasion because of the possibility of resulting prejudice

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<sup>22</sup>Id. at 719.

<sup>23</sup>Id. at 723 (dissenting opinion) (citations omitted).

<sup>24</sup>Lundberg v. Baumgartner, 5 Wash. 2d 619, 106 P.2d 566 (1940).

<sup>25</sup>Id. at 567.

<sup>26</sup>Van Gent v. Chicago, M. & St. P. Ry., 80 Iowa 526, 45 N.W. 913 (1890).

<sup>27</sup>Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 Pac. 767 (1912).

<sup>28</sup>Id. at 770.

and confusion in the minds of jurors. The possibility suggests itself that these states, while limiting recovery to pecuniary losses, are, practically speaking, putting in issue, by the admission of evidence of character traits and habits, an element of damage they purport to exclude—loss of companionship and solace.

The fact that the subject of the admissibility of character evidence in a wrongful death action has rarely been the object of clear and distinct scrutiny by the courts perhaps indicates that lawyers do not often take advantage of the opportunity to go into the character of the deceased in such cases. The *Basham* case may serve to remind counsel for plaintiffs and defendants alike that certainly under a rule of damages for wrongful death in Virginia, and perhaps in all jurisdictions, the ban on character evidence has been lifted.

GERALD O'NEAL CLEMENS

#### SPOUSAL IMPUTATION OF NEGLIGENCE IN JOINT ENTERPRISES

To impute the negligence of the driver of an automobile to a passenger there must be a relationship between them sufficient to allow a court to find some degree of fault, no matter how slight, on the passenger's part. Joint enterprise, in modern tort law, is the magic doctrine that creates such a relationship. The doctrine operates irrespective of actual fault since it is based on right of control, an agency concept often incorrectly applied to tort law in this field. *Sherman v. Korff*<sup>1</sup> investigates this fault-imputing concept and correctly holds that negligence should not be imputed unless the relationship between the passenger and driver is such that a true agency relationship can be shown to exist.

In *Sherman v. Korff*, a husband, his wife, and his mother went on a weekend fishing trip. The husband and wife were co-owners of the car; the wife was driving. The wife's negligence, concurring with the negligence of the defendant, resulted in an accident in which the husband-passenger was injured. The lower court imputed the wife's contributory negligence to the husband, thereby preventing him from recovering compensation for his injuries, even though in fact he was not negligent. The Supreme Court of Michigan reversed the decision of the trial court, Dethmers, C.J., dissenting.

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<sup>1</sup>91 N.W.2d 485 (Mich. 1958).

The majority opinion in *Sherman v. Korff* deals with two distinct legal concepts used to impute the negligence of a driver to a passenger: (1) agency through right of control; and (2) the tort doctrine of joint enterprise.

It is pure fiction, states the court, to impute the negligence of a driver to a passenger on the ground that the passenger has a right of control over the driver. Generally, "it is the duty of the passenger to sit still and say nothing."<sup>2</sup> For the passenger to attempt to exercise control over the driver is a course fraught with danger, and co-ownership of the vehicle does not alter this situation. To say that a mutual right of control in respect to ownership gives a mutual right of control while traveling on a highway is to say that an agent for one purpose is an agent for all purposes. Although there might be a right of control in the sense of ownership, the court says in the principal case that the husband had no right of control over any factor causally connected with the accident.<sup>3</sup> Thus, as viewed by this court, imputation of negligence on grounds of right of control is clearly erroneous. The court concludes its discussion of possible agency by deciding that it is just as logical to find a bailee-bailor relationship as one of agency. This appears to be valid reasoning, as right of control is a test of agency, and where there is not enough right of control to create agency, there is no reason for the court to find such a relationship.<sup>4</sup> Thus the court refused to impute the negligence of the driver to a passenger on the theory of agency because the requisite right of control was lacking.

The court holds that the application of the joint enterprise doctrine to the present fact situation would be equally untenable. Prosser says that a joint enterprise exists when there is a common purpose plus a mutual right of control, and considers this relationship as "something like a partnership, for a more limited period of time and a more limited purpose. . . . The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest."<sup>5</sup> The court has already established that there was no right of control sufficient to establish an agency relationship. It is further pointed out that the marital relationship alone does not create a joint enter-

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<sup>2</sup>Id. at 487.

<sup>3</sup>Ibid.

<sup>4</sup>Restatement (Second), Agency § 1 (1958).

<sup>5</sup>Prosser, Torts 363 (2d ed. 1955). See 4 Shearman & Redfield, Negligence § 695 (2d ed. 1941).

prise similar to that required by law for the imputation of negligence.<sup>6</sup> A husband and wife on a weekend fishing trip are engaged in a family recreational project which has no legal significance greater than that created by the marital relationship itself.<sup>7</sup>

The majority in *Sherman v. Korff* has freed itself from the decisions which impute negligence through joint enterprise by destroying the one premise essential to its existence, i.e., right of control.<sup>8</sup> The decision, in effect, holds that co-ownership of an automobile does not create a right of control which is strong enough to create either an agency relationship or a joint enterprise, and thus co-ownership will not serve to impute the negligence of a driver to a nonnegligent passenger.

Chief Justice Dethmers' dissenting opinion treats the fact situation in a more usual manner, concluding that the husband and wife were engaged in a joint enterprise. The fishing trip raised a presumption of joint enterprise, which was reinforced by co-ownership of the automobile, and its consequent right of control.

Historically, *Thorogood v. Bryan*,<sup>9</sup> an 1849 English case, is the basis for the theory of imputed negligence in the United States.<sup>10</sup> In *Thorogood* the negligence of the driver of an omnibus was imputed to a passenger. The court "identified" the two as principal and agent by saying that the passenger had a right of control over the driver.<sup>11</sup>

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<sup>6</sup>91 N.W.2d at 488.

<sup>7</sup>Id. at 488. See also *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690, 692 (1921).

<sup>8</sup>*Hower v. Roberts*, 153 F.2d 726 (8th Cir. 1946); *Roach v. Parker*, 48 Del. 519, 107 A.2d 798, 800 (Super. Ct. 1954); *Snook v. Long*, 241 Iowa 665, 42 N.W.2d 76 (1950); *Silsby v. Hinchey*, 107 S.W.2d 812, 815 (Mo. App. 1937); *Prosser, Torts* 363 (2d ed. 1955); *Note*, 33 B.U.L. Rev. 90, 92 (1953).

<sup>9</sup>8 C.B. 115, 137 Eng. Rep. 452 (1849).

<sup>10</sup>*Sherman v. Korff*, 91 N.W.2d 485 (Mich. 1958); *Prosser, Torts* 300 (2d ed. 1955); *Weintraub, The Joint Enterprise Doctrine in Automobile Law*, 16 Cornell L.Q. 320, 321 (1931).

<sup>11</sup>In *Thorogood v. Bryan*, and its companion case, *Cattlin v. Hills*, the idea was advanced that a driver and a passenger in an omnibus (horse-drawn bus) might be "identified" as master and servant, thus putting the passenger in the driver's shoes so that he could not recover against a third party if his servant driver was also negligent. In *Thorogood*, an omnibus negligently discharged a passenger, Mr. Thorogood, in the middle of the street. The defendant's omnibus negligently passed the one in which Thorogood had been riding, and in doing so, hit and killed him. The court held that the driver who let Thorogood out in the middle of the street was his agent, and thus Mrs. Thorogood was prevented from recovering from the company operating the omnibus which struck and killed Thorogood. It was mentioned in this case that Mr. Thorogood was also negligent. In the *Cattlin* case, the theory of "indentification" was seen as the reasoning behind the *Thorogood* decision. The court apparently overlooked that in *Thorogood* the decedent was also negligent. Here, two ships were traveling side by side toward the same destination.

The theory of identification as set forth in this case was temporarily adopted in some jurisdictions in the United States, but has now been completely repudiated.<sup>12</sup> It appears, however, that the principle underlying this theory of right of control by a passenger over the driver has survived and continues to serve as a device for imputing negligence under the name of joint or common enterprise.<sup>13</sup>

In the late 1800's and early 1900's the criterion for imputation of negligence between a husband and wife, in a vehicle of transportation, was right of control.<sup>14</sup> The 1897 case of *Reading Township v. Telfer*<sup>15</sup> is representative of this period. Here the court said that as between persons with mutual privileges of direction and control it is possible that the negligence might be imputed from the driver to the passengers on a theory of mutual agency or right of control. But as to a husband and wife, the court continued, the wife could not possibly have a right of control over her husband sufficient to impute to her his negligence in driving.<sup>16</sup> This implies that if such right of control could be found to exist, negligence would be imputed.

By the 1930's the courts seemed to have drifted away from this early idea that right of control sufficient to establish an agency relationship is necessary for the existence of a joint enterprise. In 1923,

They brushed each other and a negligently fastened anchor dropped from the upper deck of the defendant's ship onto the plaintiff, a passenger on the second ship. He was denied recovery because the captain of the ship on which plaintiff was a passenger was treated as his agent and the two were "identified." Thus *Cattlin v. Hills*, through what appears to be a misinterpretation of *Thorogood*, invented the doctrine of "identification."

<sup>12</sup>*Bricker v. Green*, 313 Mich. 218, 21 N.W.2d 105 (1946), delivered the final deathblow to *Thorogood*, and "identification." In the *Bricker* case judicial notice was taken of the fact that England and all jurisdictions in the United States had overruled the theory of "identification." Michigan thus became the last state to overrule the doctrine.

<sup>13</sup>*Prosser, Torts* 364 (2d ed. 1955); *Weintraub, The Joint Enterprise Doctrine in Automobile Law*, 16 *Cornell L.Q.* 320, 322 (1931).

<sup>14</sup>In *New York, C. & St. L.R.R. v. Robbins*, 38 Ind. App. 172, 76 N.E. 804 (1905), it was said that negligence would not be imputed on the basis of the marital relationship alone, but that the administrator would be denied recovery if the decedent had a right of control over the driver. See also *Munger v. City of Sedalia*, 66 Mo. App. 629 (1896), which held that the negligence of the husband-driver is not imputable to the wife when there was no evidence that the husband was acting as her agent in driving the buggy. Additional cases supporting this point are: *Chicago & E.R.R. v. Biddinger*, 61 Ind. App. 419, 109 N.E. 953 (1915); *Fishner v. Ellstrom*, 174 Iowa 364, 156 N.W. 422 (1916); *City of Louisville v. Zoeller*, 155 Ky. 192, 160 S.W. 500 (1913); *Ploetz v. Holt*, 124 Minn. 169, 144 N.W. 745 (1913); *Senft v. Western Maryland Ry.*, 246 Pa. 446, 92 Atl. 553 (1914).

<sup>15</sup>77 Kan. 798, 84 Pac. 134 (1897).

<sup>16</sup>*Id.* at 136.

*Bowley v. Duca*<sup>17</sup> expressed the view that "there must be not only a joint interest in the objects or purposes of the enterprise, but also 'an equal right to direct and govern the movements and conduct of each other with respect thereto' " before a joint enterprise exists.<sup>18</sup> In cases such as this one, it is not necessary to establish agency before finding a joint enterprise. Between 1930 and the present, the view that there can be a joint enterprise between husband and wife if there is a right of control plus common purpose, even though an agency relationship cannot be established,<sup>19</sup> has solidified.<sup>20</sup> The weight of authority will not impute the negligence of the driver to the passenger on the ground of their marital relationship alone,<sup>21</sup> nor find a joint enterprise between a husband and wife when they have a mere common purpose, such as a pleasure trip.<sup>22</sup> However, when the courts find co-ownership of the automobile, even though there is no true agency, they do not hesitate to find a joint enterprise, for joint ownership brings with it the "mutual right of control" as required by most courts.<sup>23</sup>

This, it is submitted, is the result of historical development. With the overruling of *Thorogood v. Bryan* in the early 1900's, the theory of identification was discredited, and therefore the use of an agency relationship to impute negligence fell into disrepute.<sup>24</sup> In place of agency the doctrine of joint enterprise developed, requiring a lesser degree of control than that necessary to create agency. By using this

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<sup>17</sup>80 N.H. 548, 120 Atl. 74 (1923). See also *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690 (1931).

<sup>18</sup>120 Atl. 74, 75 (1923). See also *Pence v. Kansas City Laundry Serv. Co.*, 332 Mo. 930, 59 S.W.2d 633, 636 (1935); *Alperdt v. Paige*, 292 Pa. 1, 140 Atl. 555, 557 (1928).

<sup>19</sup>See note 25 infra.

<sup>20</sup>See text at note 5 supra. *Caliando v. Huck*, 84 F. Supp. 598 (N.D. Fla. 1949); *Silsby v. Hinchey*, 107 S.W.2d 812, 815 (Mo. App. 1937); *Dederman v. Summers*, 135 Neb. 453, 282 N.W. 261 (1938).

<sup>21</sup>*Ross v. British Yukon Nav. Co.*, 188 F.2d 779, 781 (9th Cir. 1951); *Besset v. Hockett*, 66 So. 2d 694, 698 (Fla. 1953); *Holmes v. Combs*, 120 Ind. App. 331, 90 N.E.2d 822, 823 (1950); *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466, 472 (1955); *White v. Keller*, 215 P.2d 980 (Ore. 1950).

<sup>22</sup>*Holmes v. Combs*, 120 Ind. App. 331, 90 N.E.2d 822, 823 (1950); *Stilson v. Ellis*, 208 Iowa, 1157, 225 N.W. 346, 351 (1929); *Thompson v. Sides*, 275 Mass. 568, 176 N. E. 623, 624 (1931); *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757, 761 (1948).

<sup>23</sup>*Caliando v. Huck*, 84 F. Supp. 598 (N.D. Fla. 1949); *Moore v. Skiles*, 130 Colo. 191, 274 P.2d 311, 315 (1954). This is not to be confused with the holdings of community property states such as California and Louisiana. In these states the non-negligent passenger is denied recovery because it would result in unjust enrichment of the negligent spouse.

<sup>24</sup>Note 12 supra.



doctrine, a court was free of the word "identification," although the method used and the end result were substantially the same.<sup>25</sup>

In the *Sherman* case the court found the existing right of control insufficient to establish an agency relationship or a joint enterprise. While a majority of courts appear not to require an actual agency relationship before they will invoke the joint enterprise doctrine,<sup>26</sup> *Sherman v. Korff* recognizes the necessity of doing so, since a relationship not strong enough to create agency should not serve the purpose of bringing about the results of agency. *Sherman v. Korff* calls this imputation of negligence in the absence of agency an unjustified application of an undesirable fiction, and asks of the result: "Is this law or is this magic?"<sup>27</sup> The implication is that it is magic, but unfortunately it is the law in many jurisdictions. In the case of husband and wife co-owners, the fiction basic to many agency relationships has brought about an undesirable result. *Sherman v. Korff* reaches its conclusion by not incorrectly applying an agency concept to the tort doctrine of joint enterprise. By not adhering to what appears to be a fictional and incorrect intermixture of theory, *Sherman v. Korff* has rendered a decision of great merit in its intellectual honesty and just result.<sup>28</sup>

JOHN P. HILLS

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<sup>25</sup>Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 Cornell L.Q. 320, 322 (1931), says of these cases where joint enterprise is found without there being an agency relationship: [O]f course, in all of these cases no actual agency exists, for if an actual agency did exist there would be no need to resort to a theory other than respondeat superior to obtain the desired result."

<sup>26</sup>In *Ross v. British Yukon Nav. Co.*, 188 F.2d 779, 781 (9th Cir. 1951), it was said that "the generally accepted rule is that the negligence of the husband is not to be imputed to the wife unless he is her agent in driving the automobile in which she is riding or they are engaged in the prosecution of a common enterprise." This statement leads to the conclusion that the two concepts are independent and thus a common enterprise can exist without there being an agency relationship.

<sup>27</sup>91 N.W.2d at 486.

<sup>28</sup>See *Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952), in which a similar result was reached.

### CONTRIBUTION: LIMITATION ON THE LIABILITY OF ONE TORTFEASOR\*

A train and a truck are involved in a collision in which a brakeman on the train is killed. The railroad settles for \$42,500 an action brought against it under the Federal Employers' Liability Act by the administrator for the brakeman. The railroad then sues the truck owner, whose liability for the wrongful death is based on a state wrongful death statute under which the maximum recovery is limited to \$17,500. Is the railroad entitled to recover and, if so, what is to be the amount of the recovery?

This was the knotty problem presented in *Northern Pac. Ry. v. Zontelli Bros., Inc.*<sup>1</sup> The decedent's administratrix decided to sue the railway under the Federal Employers' Liability Act. In due course Zontelli Brothers was made a third party defendant by order of the court. The railway settled with the widow of the brakeman for \$42,500 and instituted an action for contribution against Zontelli Brothers. The jury in this last action found that the railway and the truck company were both negligent and rendered a verdict for \$21,500 in favor of the railway. The maximum recovery which the administratrix could have obtained under the Minnesota Wrongful Death Act if she had sued Zontelli directly was \$17,500.<sup>2</sup>

The underlying premise on which contribution among joint tortfeasors is based is the compensation of one who has discharged a debt for which several are liable.<sup>3</sup> This compensation may be explained either on a quasi-contractual obligation on the part of each

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\*Ed. Note: The following case comment discusses the decision of the district court in *Northern Pac. Ry. v. Zontelli Bros., Inc.*, 161 F. Supp. 769 (D. Minn. 1958). After this comment was written, the Court of Appeals for the Eighth Circuit affirmed the decision in *Zontelli Bros., Inc. v. Northern Pac. Ry.*, 45 A.B.A.J. 287 (8th Cir. Jan. 26, 1959). In affirming the decision of the district court, the court of appeals reformed the judgment below by holding that the maximum contribution available from Zontelli Brothers was \$17,500, the limitation placed by the wrongful death act of Minnesota on Zontelli's liability.

<sup>1</sup>161 F. Supp. 769 (D. Minn. 1958).

<sup>2</sup>37 Minn. Stat. Ann. § 573.02 which reads: "Subdivision 1 . . . . The recovery in such action in such an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death, shall not exceed \$17,500 and shall be for the exclusive benefit of the surviving spouse and next of kin proportionate to the pecuniary loss severally suffered by the death." The limit on recovery has since been raised to \$25,000. Laws of Minn. 1957, ch. 712, § 573.02.

<sup>3</sup>*Parten v. First Nat. Bank & Trust Co.*, 204 Minn. 200, 283 N.W. 408, 412 (1938); *Brown v. Hargraves*, 198 Va. 748, 96 S.E.2d 788, 791 (1957); *Wait v. Pierce*, 191 Wis. 202, 226, 210 N.W. 822, 823 (1926).

to help bear the common burden,<sup>4</sup> or on an equitable principle of equality in sharing the common burden and preventing unjust enrichment after another tortfeasor has paid the entire debt.<sup>5</sup>

At common law there was no right to contribution among joint tortfeasors. The law left the parties where it found them on the theory that one should not be permitted to bring an action based on one's own wrong.<sup>6</sup> However, because of vigorous denunciation of this common law principle by writers, many jurisdictions, either by statute or judicial decision, now permit contribution among joint tortfeasors.<sup>7</sup>

In order for a right of contribution to exist there must have been common liability from joint tortfeasors to the original plaintiff.<sup>8</sup>

"Contribution of any sort presupposes a common burden or incubus resting upon all members of a group, more than his share of which one of such members has discharged for the benefit of all. It is an equitable device to redistribute the common burden rateably and in a fashion different from that employed by the person to whom each one of the group is usually answerable severally for the entire amount. In cases of contract contribution it is ordinarily quite easy to determine the amount of the common obligation . . . . But this is not true of the common obligation in tort contribution."<sup>9</sup>

It is generally held that the mere existence of concurring negligence by joint tortfeasors is not the test which must be applied.<sup>10</sup> Common liability does not mean that contribution between concurrent tort-

<sup>4</sup>*Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951); *Proff v. Maley*, 14 Wash. 2d 287, 128 P.2d 330 (1942).

<sup>5</sup>*Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N.J. 372, 102 A.2d 587, 593, 595 (1954).

<sup>6</sup>*Warner v. Capital Transit Co.*, 162 F. Supp. 253, 255 (1958); *Prosser, Torts* 246-49 (2d ed. 1955).

<sup>7</sup>*Prosser, Torts* 248-49 (2d ed. 1955); *Gregory, Contribution Among Tortfeasors; A Uniform Practice*, 1938 Wis. L. Rev. 365; *Note*, 32 Colum. L. Rev. 94 (1932); *Note*, 45 Harv. L. Rev. 349 (1931).

<sup>8</sup>*Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Chapman v. Lamar-Rankin Drug Co.*, 13 S.E.2d 734 (Ga. App. 1941); *Zutter v. O'Connell*, 200 Wis. 60, 229 N.W. 74 (1930); See also: *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955); *Fisher v. Diehl*, 156 Pa. Super. 476, 40 A.2d 912 (1945). When the Pennsylvania court points out that although a wife may not sue her husband for personal injuries, this does not prevent one who is jointly liable with a husband for injuries suffered by the wife from obtaining contribution from the husband. Pennsylvania follows the theory that as between two tortfeasors the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.

<sup>9</sup>*Gregory, Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wis. L. Rev. 365, 369.

<sup>10</sup>*Yellow Cab Co. v. Dreslin*, 181 F.2d 626 (D.C. Cir. 1950); *Leflar, Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 131 & n.9 (1932).

feasors can be enforced only if both are judgment debtors of the plaintiff.<sup>11</sup> However, when the liability is joint and several, though the acts of the negligent parties were independent and concurrent, there is common liability<sup>12</sup> unless the tortfeasor from whom contribution is sought could not have been sued because of a marital, filial, or other family relationship, or unless there was an assumption of the risk by the plaintiff as far as this defendant was concerned.<sup>13</sup> In either of the latter cases there would be no liability, common or otherwise.

The Supreme Court of North Carolina held in *Wilson v. Massagee*,<sup>14</sup> a 1944 decision, that there was no common liability to support contribution where the liability of one of the joint tortfeasors was based on a state wrongful death act and the other tortfeasor's liability arose under the Federal Employers' Liability Act. Wilson, an employee of the Southern Railway Company, was killed when a truck owned by the Sinclair Refining Company and driven by Massagee collided with a Southern train. Mrs. Wilson sued Massagee and Sinclair Refining under the North Carolina Wrongful Death Act. By motion defendant Massagee sought to join Southern Railway as a third party defendant on the theory that Massagee would be entitled to contribution from Southern Railway if it were shown during the course of the trial that Massagee and the railway both were liable to the plaintiff. Southern Railway appeared specially, moving the court to strike the order joining it as a party defendant and to dismiss the action as to it. The court granted the railway's motion on the ground that since the action against the truck driver [Massagee] was based on the North Carolina Wrongful Death Act, whereas the action against Southern Railway was based on the Federal Employers' Liability Act, there was no common liability among the alleged joint tortfeasors so as to support contribution.

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<sup>11</sup>*Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 220 (D.C. Cir. 1942). There are, however, eight states (New York, Delaware, Michigan, Mississippi, Missouri, North Carolina, Texas and West Virginia) which have statutes applying only to contribution between defendants against whom there is a joint judgment. Smith and Prosser, *Cases and Materials on Torts* 463 (2d ed. 1957). See Uniform Contribution Among Tortfeasors Act § 1(a): "Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort . . . for the same wrongful death; there is a right of contribution among them even though judgment has not been recovered against all or any of them."

<sup>12</sup>*George's Radio, Inc. v. Capital Transit Co.*, supra note 11; *Piratensky v. Wallach*, 162 Misc. 749, 295 N.Y. Supp. 581 (N.Y. City Ct. 1935).

<sup>13</sup>*Yellow Cab Co. v. Dreslin*, supra note 10; Annot., 19 A.L.R.2d 1003 (1951). See note 8 supra.

<sup>14</sup>224 N.C. 705, 32 S.E.2d 335 (1944).

As between two states, it is generally held that a judgment for damages for the wrongful death of a person is a bar to an action under a statute of another jurisdiction or in another state to recover for the same death where the *real party in interest* is the same, even though the *nominal parties* are different.<sup>15</sup> Under this view, therefore, one joint tortfeasor would be entitled to contribution from another joint tortfeasor, since payments by the first tortfeasor would relieve the second from his liability. On analogy this result would seem to follow as between one state and the Federal Employers' Liability Act.

In the *Wilson* case, the North Carolina court held that there was no common liability to support contribution since the beneficiary under the Wrongful Death Act<sup>16</sup> was not the same as the beneficiary under the Federal Employers' Liability Act. But the principal case is to be distinguished from *Wilson* on this point: the surviving wife is beneficiary under both the Federal Employers' Liability Act and the Minnesota Wrongful Death Act.<sup>17</sup> Payment by one joint tortfeasor under one of these acts would relieve the other joint tortfeasor of his liability under the other act. Hence, there seems to be common liability in the principal case so as to support contribution, the Minnesota court having specifically found the railway and Zontelli to be jointly and severally liable to the surviving widow.<sup>18</sup>

Since Minnesota is one of six states to adopt contribution without

<sup>15</sup>Chicago, R.I. & Pac. Ry. v. Schendel, 270 U.S. 611 (1926); Teixeira v. Goodyear Tire & Rubber Co., 261 F.2d 153 (1st Cir. 1958); McCarron v. New York Cent. R.R., 239 Mass. 64, 131 N.E. 478 (1921); See Luce v. New York, Chicago and St. L.R.R., 242 N.Y. 518, 152 N.E. 409 (1926).

<sup>16</sup>N.C. Gen. Stat. § 28-173 (1950); See also N.C. Gen. Stat. § 28-149 (1950), which provides "the surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided: 1. If a married man die intestate leaving one child and a wife, the estate shall be equally distributed between the child and wife; . . . 2. If there is more than one child, the widow shall share equally with all the children and be entitled to a child's part; . . . 3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate . . ."

<sup>17</sup>Federal Employers' Liability Act, § 1, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1952): "[E]very common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee . . ." 37 Minn. Stat. Ann. § 573.02 states: "The recovery in such action . . . shall be for the exclusive benefit of the surviving spouse and next of kin proportionate to the pecuniary loss severally suffered by the death."

<sup>18</sup>161 F. Supp. at 771, 772.

a statute,<sup>19</sup> the court in the principal case held that the wrongful death act will not be construed as defeating the common law right to contribution, and thus the railroad was permitted to receive one-half its settlement from Zontelli through contribution. It is submitted, however, that the recovery limitation imposed by the Minnesota Wrongful Death Act could be enforced without defeating the supposed common law right of contribution. Contribution "hinges on the doctrine that general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors, without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled."<sup>20</sup>

What should be the aliquot portion which Zontelli ought to pay or bear in the principal case? In suretyship, contribution is proportionate to the interest held or the liability undertaken.<sup>21</sup> Applying the suretyship theory to the case in comment, Zontelli's liability should be limited to \$17,500 since that is the maximum for which he would have been liable under the Minnesota Wrongful Death Act; the railway's liability should be limited to \$42,500, which is the total amount of the debt due. The railway and Zontelli would therefore be "sureties" to the extent of \$60,000 on a \$42,500 debt. Zontelli, in view of the obligation undertaken under the death act, would be liable to the railway for \$12,395.83 under this suretyship theory.<sup>22</sup>

Basing contribution on an equitable principle of equality aimed at preventing unjust enrichment, Zontelli could not have been enriched more than the amount for which he could have been liable

<sup>19</sup>The only states to adopt contribution without a statute are Pennsylvania, Louisiana, Iowa, Minnesota, Tennessee, and Wisconsin. Smith and Prosser, *Cases and Materials on Torts* 461 (2d ed. 1957).

<sup>20</sup>*George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 221 (D.C. Cir. 1942).

<sup>21</sup>*Southern Surety Co. v. Commercial Cas. Ins.*, 31 F.2d 817 (3d Cir. 1929), cert. denied, 280 U.S. 577 (1929); *United States Fid. and Guar. Co. v. Naylor*, 237 Fed. 314 (8th Cir. 1916); *Restatement, Restitution* § 86 (1937).

limit on Zontelli's liability for wrongful death				
total limit on liability of Zontelli and the railroad	times	debt due as a result of the settlement	equals	amount owed by Zontelli

In figures, this formula produces the amount of the settlement [\$42,500] which is attributable to Zontelli:

17,500				
(17,500) plus (42,500)	times	\$42,500	equals	\$12,395.83

to deceased's representative before the railway paid the debt.<sup>23</sup> Under the Minnesota Wrongful Death Act, Zontelli's total liability would be limited to \$17,500 if he were a sole tortfeasor. However, where there are two joint tortfeasors and the death results from their concurring negligence, the remedy of contribution is available.<sup>24</sup> A paying defendant whose liability is fixed by the wrongful death act would be entitled to one-half of the amount paid in settlement.<sup>25</sup> In the case in comment that amount would be limited to \$8,750.

Since the court found that Zontelli was relieved of an obligation to the administratrix, he was unjustly enriched to that extent. Aside from considerations of contribution, his unjust enrichment must be limited to \$17,500 since that is the maximum amount he would have been liable for had he been sued directly. The only explanation for the result of the court in the principal case seems to be an application of a comparative negligence doctrine.<sup>26</sup> The court is treating the action as a tort suit rather than as an action for contribution. Since the jury found that the railway and Zontelli were equally negligent,

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<sup>23</sup>"Contribution is an equitable principle of equality in the sharing of a common burden arising out of contract or status, to enforce restitution and prevent unjust enrichment, that at common law does not extend to persons in equal or mutual fault. *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N.J. 372, 102 A.2d 587, 593 (1954). See also *Phillips-Jones Corp. v. Parmley*, 302 U.S. 233, 236 (1937). Mr. Justice Brandeis speaking for the court said: "The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover, a plaintiff must prove that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations."

<sup>24</sup>The basic theory upon which contribution is permitted is that the party from whom contribution is sought must have been relieved of a debt or obligation and accordingly should be required to reimburse the person who paid, thereby relieving him from such debt or obligation. *Merrimac Mining Co. v. Gross*, 216 Minn. 244, 12 N.W.2d 506 (1943). See also *American Automobile Ins. Co. v. Molling*, 239 Minn. 74, 57 N.W.2d 847 (1953).

<sup>25</sup>If an action had been brought under the Minnesota Wrongful Death Act against Zontelli arising out of the death of plaintiff's intestate, and Zontelli had sought contribution from the railroad, the railroad's maximum liability would have been \$8,750. See *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E.2d 437 (1938) for apportionment of contribution in certain cases.

<sup>26</sup>"Under the new English Statute, the Canadian Statutes and the Maritime Conventions Act, however, contribution is apportioned among the tortfeasors in accordance with their respective degrees of fault . . . This feature is in keeping with an analogous trend in Anglo-American law to qualify the harshness of the defense of contributory negligence by merely cutting down a negligent plaintiff's recovery of damages in accordance with his respective degrees of fault." Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wis. L. Rev. 365, 372, 373. The court in the principal case found the truck company and the railroad equally negligent so the recovery by the plaintiff was borne equally by each of them.

the court merely split the settlement without considering that contribution could be given without destroying the limitation placed by the wrongful death act on Zontelli's liability. The principal case has allowed the railway to recover more through contribution than the administratrix could have recovered had she sued Zontelli directly.

JOHN R. ALFORD

### INSURER LIABLE FOR BENEFICIARY'S MURDER OF LIFE INSURED

When Mrs. Earle Dennison became the first white woman to be electrocuted by the State of Alabama, the factual background for an unusual tort decision was complete. Mrs. Dennison was convicted of the murder of her two and one-half year old niece, Shirley Weldon, on whose life she had taken out three insurance policies, naming herself as beneficiary.<sup>1</sup> Shirley's father sued the insurance companies for wrongful death, claiming they had been negligent in issuing policies to a beneficiary who had no insurable interest in the life of the insured child and that this negligent act was the proximate cause of Shirley's death at the hands of the beneficiary aunt.<sup>2</sup> The father obtained a judgment for punitive damages in the amount of \$75,000 which was upheld by the Supreme Court of Alabama in *Liberty Nat'l Life Ins. Co. v. Weldon*.<sup>3</sup>

Actually, Mrs. Dennison was Shirley's aunt-in-law, for her deceased husband was the brother of Shirley's mother. Living in a different town than the Weldons, she rarely saw Shirley and did not contribute to her support. The evidence indicated that the insurance agents made an inadequate investigation of this relationship for the purpose of ascertaining the existence of an insurable interest.<sup>4</sup>

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<sup>1</sup>Dennison v. State, 259 Ala. 424, 66 So. 2d 552 (1953).

<sup>2</sup>Ala. Code tit. 7, § 119 (1940).

<sup>3</sup>100 So. 2d 696 (Ala. 1958).

<sup>4</sup>Mrs. Dennison took out policies on Shirley's life with three insurance companies. Liberty National issued a \$500 policy on December 1, 1951. The agent knew the relationship between Mrs. Dennison and Shirley, and company policy does not make an aunt an acceptable beneficiary. Company policy also requires the consent of the parents for a policy on a child under ten; neither parent knew of the policy. Southern Life and Health issued a \$5,000 policy in March of 1952. Mrs. Dennison submitted a false medical statement signed by a doctor in another town. The agent told the parents that Mrs. Dennison was taking out an educational policy on Shirley, but they did not consent or know that the policy had actually been issued. National Life and Accident issued a \$1,000 policy in April of 1952. The plaintiff testified that he told the agent not to issue any policy on Shirley's life.



This factual situation presents two basic issues: First, were the insurers negligent in issuing life policies providing for the payment of the proceeds to a beneficiary who had no insurable interest in the life insured? Secondly, if the issuance of the policies was negligent, was this act the proximate cause of the insured's death?

The defendant's negligence in the *Liberty National* case was necessarily based on the premise that Mrs. Dennison did not have an insurable interest in Shirley's life. Blood relationship alone does not give an aunt an insurable interest in the life of her niece.<sup>5</sup> The evidence in the case showed that the aunt had no insurable interest since she had no reasonable expectation of receiving profit or advantage from the continued life of Shirley.<sup>6</sup> Insurance policies taken out by one person on the life of another, without an insurable interest, are illegal and void, as repugnant to public policy.<sup>7</sup> This public policy nullifies such a contract of life insurance because the holder of the insurance has a monetary interest in the death of the insured which creates a temptation to crime.<sup>8</sup>

The opinion in the *Liberty National* case fails to clarify the court's purpose in discussing the danger to human life which is present when a life insurance policy is sold to a beneficiary who has no insurable interest in the life of the insured. However, it would seem that the court was trying to establish the scope of risk created by defendants' failure to use reasonable care in issuing these life policies.<sup>9</sup> Upon concluding that the defendants' acts were negligent, the court goes on to state

<sup>5</sup>*Commonwealth Life Ins. Co. v. George*, 248 Ala. 649, 28 So. 2d 910, 913 (1947); *Wilton v. New York Life Ins. Co.*, 34 Tex. Civ. App. 156, 78 S.W. 403 (1904).

<sup>6</sup>*Warnock v. Davis*, 104 U.S. 775, 779 (1881); *Continental Life Ins. Co. v. Volger*, 89 Ind. 572 (1883); *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35 (1875); *Rombach v. Piedmont & Arlington Life Ins. Co.*, 35 La. Ann. 233 (1883); *Vance, Insurance* 154, 155 (2d ed. 1930).

<sup>7</sup>*Warnock v. Davis*, *supra* note 6, at 779; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. 249, 254 (W.D. Pa. 1881); *Helmetag's Adm'x v. Miller*, 76 Ala. 183, 186 (1884).

<sup>8</sup>*Helmetag's Adm'x v. Miller*, *supra* note 7, at 187; *Hinton v. Mutual Reserve Fund Life Ass'n*, 135 N.C. 314, 47 S.E. 474, 477 (1904); *Vance, Insurance* 154 (2d ed. 1930).

A life insurance policy issued to a beneficiary who does not have an insurable interest in the life of the insured is also called a wager policy. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 460 (1876); *Commonwealth Life Ins. Co. v. George*, 28 So. 2d 910, 912 (Ala. 1947). Such a wager on the life expectancy of a human being is declared void because of the tendency to induce the violent death of the subject of the wager. *Warnock v. Davis*, 104 U.S. 775, 779 (1881); *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 45 (1875); *Goddard v. Garrett*, 2 Vern 269, 23 Eng. Rep. 774 (Ch. 1692); *Gilbert v. Sykes*, 16 East 149, 159, 104 Eng. Rep. 1045, 1049 (K.B. 1812).

<sup>9</sup>100 So. 2d at 707.

that these acts would not be actionable unless they breached duties to the plaintiff and were also the proximate cause of the injury.<sup>10</sup> According to the *Restatement*, conduct is negligent if it subjects an interest of another to a certain hazard, and, in order to protect the other from the risk of an invasion of his interest by the hazard, the law creates a duty to refrain from the negligent conduct.<sup>11</sup>

Insurance companies often require proof of insurable interest.<sup>12</sup> Such inquiry can hardly be called burdensome where human life is involved.<sup>13</sup> The statements of the beneficiary-purchaser alone ought not to be sufficient, especially when the policy is to be issued on the life of a child of two or three.<sup>14</sup> It appears from the testimony recited in the opinion of the principal case that the defendant insurers relied on Mrs. Dennison's statements that she was interested in Shirley's welfare. There was also evidence indicating that the defendants merely informed Shirley's parents of Mrs. Dennison's intention to purchase but did not obtain their consent to the issuance of the policies.<sup>15</sup> Therefore, it seems that the defendants, by exercising more diligence, should have known that Mrs. Dennison had no insurable interest in Shirley's life, and thus were negligent. Where knowledge necessary for

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<sup>10</sup>*Ibid.*

<sup>11</sup>*Restatement* (1948 Supp.), Torts § 281, comment e (1949).

<sup>12</sup>An aunt is not an acceptable beneficiary according to the Liberty National Life Ins. Co. instruction book given to its agents. 100 So. 2d at 706. The writer's personal inquiries and conversations with a certified life underwriter revealed that policies such as were written on Shirley Weldon's life by the defendants are not generally acceptable, and that a reputable firm would issue such a policy only as a result of a gross oversight.

<sup>13</sup>The greater the known or reasonably to be anticipated danger, the greater the degree of care that must be exercised. *Barret v. Caddo Transfer & Warehouse Co.*, 165 La. 1075, 116 So. 563, 564 (1928); *Shobert v. May*, 40 Ore. 68, 66 Pac. 466 (1901); *Van Dyke v. Grand Trunk Ry.*, 84 Vt. 212, 78 Atl. 958, 964 (1911); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891). If human life is involved, highest care is required. *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 50, 25 So. 793, 798 (1899); *Gayzer v. Taylor*, 76 Mass. 274 (1857); *Ashby v. Philadelphia Elec. Co.*, 328 Pa. 474, 195 Atl. 887, 889 (1938). Risk should be balanced against the social value of the interest of the actor and disadvantages of pursuing another course. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Williams v. East Bay Motor Coach Lines*, 16 Cal. App. 2d 169, 60 P.2d 320 (1936); *Chicago B. & Q.R.R. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880, 883 (1902); *Prosser*, Torts 122 (2d ed. 1955).

<sup>14</sup>A person known to be young and inexperienced is entitled to care proportionate to his ability to protect himself, and the duty to avoid injury increases with the inability of a child to protect himself. *Lehman v. Hoover*, 100 F.2d 127 (6th Cir. 1938); *Taylor v. Patterson's Adm'r*, 272 Ky. 415, 114 S.W.2d 488, 490 (1938); *Short v. Nehi Bottling Co.*, 145 S.W.2d 684, 688 (Tex. Ct. Civ. App. 1940); *Crosswhite v. Shelby Operating Corp.*, 182 Va. 713, 30 S.E.2d 673, 674 (1944).

<sup>15</sup>100 So. 2d at 707.

due care can be acquired by the exercise of reasonable diligence, voluntary ignorance is negligence.<sup>16</sup>

Even though the defendants were negligent, there would be no liability unless that negligence were the proximate cause of the plaintiff's injury.<sup>17</sup> The Alabama court follows the doctrine that "when some agency has intervened and has been the immediate cause of the injury . . . the party guilty of negligence in the first instance is not responsible, unless at the time of the original negligence the act of the agency could have been reasonably foreseen."<sup>18</sup> Although this is undoubtedly the prevailing view at the present time,<sup>19</sup> some courts have been reluctant to impose liability when the intervening act is criminal.<sup>20</sup> This reluctance is understandable, for at one time any intervening cause relieved a negligent party of liability for harm resulting from his act; the last human wrongdoer alone being held responsible.<sup>21</sup> The results under the last human wrongdoer rule were not desirable, and the cases developed the principle that intervening negligent conduct did not relieve a defendant of liability if the intervening act should have been foreseen.<sup>22</sup> In accordance with this concept, most courts have gone further, holding that a foreseeable intervening *criminal* act will not sever the chain of causation, and, accordingly, will not relieve the defendant of liability.<sup>23</sup> Nevertheless, some cases have held

<sup>16</sup>*Mattson v. Cent. Elec. & Gas. Co.*, 174 F.2d 215, 220 (8th Cir. 1949); *Go-brecht v. Beckwith*, 82 N.H. 415, 135 Atl. 20, 22 (1926). Risk involves recognized danger, based on knowledge of existing facts and a reasonable belief that harm may follow. *Restatement, Torts* § 289 (1934); *Prosser, Torts* 121, 131 (2d ed. 1955); *Seavey, Negligence—Subjective or Objective*, 41 Harv. L. Rev. 1, 5 (1928).

<sup>17</sup>*Clare v. Farrell*, 70 F. Supp. 276, 279 (D. Minn. 1947); *Black v. Love & Amos Coal Co.*, 30 Tenn. App. 377, 206 S.W.2d 432, 434 (1947); *Comstock v. Wilson*, 257 N.Y. 231, 177 N.E. 431, 432 (1931).

<sup>18</sup>100 So. 2d at 709.

<sup>19</sup>*Prosser, Torts* 266 (2d ed. 1955); *Eldridge, Culpable Intervention as Superseding Cause*, 86 U. Pa. L. Rev. 121, 125 (1937).

<sup>20</sup>*The Lusitania*, 251 Fed. 715 (S.D.N.Y. 1918); *Andrews v. Kinsel*, 114 Ga. 390, 40 S.E. 300 (1901); *Milostan v. Chicago*, 148 Ill. App. 540 (1901).

<sup>21</sup>*Eldridge, supra* note 19, at 124, citing *Vicars v. Wilcock*, 8 East 1, 103 Eng. Rep. 244 (K.B. 1806).

<sup>22</sup>*Bole v. Pittsburgh Athletic Co.*, 205 Fed. 468 (3d Cir. 1913); *Louisville & N. R.R. v. Maddox*, 236 Ala. 594, 183 So. 849 (1938); *Rowell v. City of Wichita*, 162 Kan. 294, 176 P.2d 590 (1947); *Lane v. Atlantic Works*, 111 Mass. 136 (1872); *Gilman v. Noyes*, 57 N.H. 627, 630 (1876); *Bennet v. Robertson*, 107 Vt. 202, 177 Atl. 625, 628 (1935); *Eldridge, supra* note 19, at 124.

<sup>23</sup>*Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201, 210 (1949); *Southwestern Bell Tel. Co. v. Adams*, 199 Ark. 254, 133 S.W.2d 867, 872 (1939); *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943); *Bellows v. Worcester Storage Co.*, 297 Mass. 188, 7 N.E.2d 588 (1937); *Brauer v. New York Cent. & H.R.R.*, 91 N.J.L. 190, 103 Atl. 166 (1918); *Green v. Atlanta & C. Air Line Ry.*, 131 S.C. 124, 126 S.E. 441 (1925); *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921); *Whitehead v. Stringer*, 106 Wash. 501, 180 Pac. 486 (1919).

that there is no reason to anticipate an intervening criminal act, and thus such an act automatically breaks the chain of causation.<sup>24</sup> These cases amount to a refusal by the courts to extend the liability of a negligent party to include harm resulting from the intervention of the intentional wrongful acts of a third person. This attempt to limit liability has resulted in some rather harsh decisions where negligent defendants exposed plaintiffs to almost certain harm at the hands of a third person and yet were relieved of liability because there was no reason to anticipate a criminal act.<sup>25</sup> For example, in the Georgia case of *Henderson v. Dade Coal Co.*,<sup>26</sup> the defendant had leased a convict from the state and was charged with the custody of the prisoner until his term had been served. Although the prisoner was known to be vicious and immoral, the defendant negligently allowed him to roam freely about. The convict raped the plaintiff who was denied recovery because the defendant could not be expected to foresee any crime at all.

The fact that some human beings do commit crimes cannot be ignored.<sup>27</sup> Therefore, it seems erroneous to hold that a foreseeable negligent act will not relieve a defendant from liability while all intervening criminal acts will insulate the defendant on the premise that no one can be expected to foresee a criminal act. Under the principle applied in cases such as *Henderson*, it appears that a party can go quite far in exposing someone to danger from another's malice although one cannot expose his fellows to the likelihood that another's negligence may cause harm. It is submitted that the better view is that, while there is less reason to anticipate a criminal act than a negligent one,<sup>28</sup> there are situations which create such temptations and opportunity for crime that the reasonable man should recognize them and take proper precautions.<sup>29</sup>

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<sup>24</sup> *Andrews v. Kinsel*, 114 Ga. 390, 40 S.E. 300 (1901); *Chancey v. Norfolk & W. Ry.*, 174 N.C. 351, 93 S.E. 834 (1917); *Phillips v. Citizens' Nat. Bank*, 15 S.W.2d 550, 552 (Tex. Comm'n App. 1929).

<sup>25</sup> *Andrews v. Kinsel*, *supra* note 24.

<sup>26</sup> 100 Ga. 568, 28 S.E. 251 (1897).

<sup>27</sup> Restatement, Torts § 302, comment j (1934).

<sup>28</sup> *Crandall v. Consolidated Tel., Tel. & Elec. Co.*, 14 Ariz. 322, 127 Pac. 994, 997 (1912); *Watson v. Kentucky & Ind. Bridge & R.R.*, 137 Ky. 619, 126 S.W. 146 (1910); Prosser, Torts 141 (2d ed. 1955); Eldridge, *supra* note 19, at 125.

<sup>29</sup> *Jensen v. United States War Shipping Administration*, 88 F. Supp. 542 (E.D. Pa.), *aff'd*, 184 F.2d 72 (3d Cir. 1950); *De la Bere v. Pearson*, [1907] 1 K.B. 483; Restatement, Torts § 302, comment n (1934); Prosser, Torts 142 (2d ed. 1955); Eldridge, *supra* note 19, at 125; Feezer, *Intervening Crime and Liability for Negligence*, 24 Minn. L. Rev. 635, 648 (1940).

The cases holding that a foreseeable intervening criminal act will not relieve a negligent party of liability are not always clear as to what conditions make a criminal act foreseeable. Terms such as "likely" and "probable" are frequently used. Perhaps the best guide is to be found in comment *b* of section 448 of the *Restatement of Torts*, which states that an intervening criminal act will be considered foreseeable and not a superseding cause if the defendant's negligent conduct creates: (1) a situation "affording temptations to which a recognizable percentage of humanity is likely to yield;" or (2) a situation where "persons of peculiarly vicious type are likely to be."

In the principal case the Alabama Supreme Court quoted this section and correctly applied it to the facts to find that the defendants' acts were the proximate cause of the plaintiff's injury. "They created a situation of a kind which this court and others have consistently said affords a temptation to a recognizable percentage of humanity to commit murder."<sup>30</sup> The court then quoted an earlier Alabama case which had held that a wager policy is illegal because the holder has a pecuniary interest in the death of the insured which opens "*a wide door by which a constant temptation is created to commit for profit the most atrocious of crimes.*" (Emphasis added.)<sup>31</sup>

GEORGE H. FRALIN, JR.

### ATTENDANCE OF OUT-OF-STATE WITNESSES IN CRIMINAL TRIALS\*

The effort to compel the attendance of out-of-state witnesses in criminal proceedings received a serious set-back when the Supreme Court of Florida, in the case of *In re O'Neill*,<sup>1</sup> invalidated that state's act, which was the uniform act on the subject. The court based its decision primarily on the ground that the right of free ingress and egress between the states, as guaranteed by the privileges and immunities

<sup>30</sup>100 So. 2d at 711.

<sup>31</sup>*Id.* at 708, citing *Helmetag's Adm'x v. Miller*, 76 Ala. 183, 187 (1884). (Emphasis added.)

\*Ed. Note: The following case comment discusses the decision of the Florida Supreme Court in the case of *In re O'Neill*, 100 So. 2d 149 (Fla. 1958). After this comment was written, the United States Supreme Court in the case of *New York v. O'Neill*, 27 U.S.L. Week 4189 (U.S. March 2, 1959), reversed the decision of the Florida Supreme Court. Justice Frankfurter delivered the majority opinion of the Court. Justices Douglas and Black dissented.

<sup>1</sup>100 So. 2d 149 (Fla. 1958), cert. granted, 358 U.S. 803 (1958).

clauses of the federal constitution, had been violated by the uniform act.<sup>2</sup> The court also discussed the possibility that the act gave extra-territorial jurisdiction to Florida's courts and questioned the power of a Florida court to enforce an order for a witness to appear before a court of another state.

In 1936 the National Conference of Commissioners on Uniform State Laws and the American Bar Association recommended to the states the adoption of a Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.<sup>3</sup> A total of forty-three states and territories have adopted either the uniform act itself or similar legislation.<sup>4</sup> The uniform act, adopted by Florida in 1941,<sup>5</sup> provides that a judge of any state having a similar law may initiate a demand for a witness by filing a certificate under seal in any court of the state in which the witness is present.<sup>6</sup> The certificate must show that a criminal proceeding is pending in the demanding state, that the person sought is a material witness in such a proceeding, and that his presence is necessary for the furtherance of justice. A judge of the court in which the certificate has been filed holds a hearing at which the witness will be required to appear. At the hearing the judge will consider the following: (1) whether the witness is necessary to the out-of-state proceeding; (2) whether the witness will be caused undue hardship by appearing in the out-of-state court; and (3) whether the demanding state has laws that will protect the witness from arrest or service of process while attending the out-of-state proceeding. If the judge decides to compel the witness to testify in the demanding state, he may do so either by issuing a summons directing the witness to attend and testify in the demanding out-of-state court, or by placing the witness in the custody of an officer of the demanding state.

Recently, the State of New York, following the above-outlined procedure, filed a certificate in a Florida circuit court.<sup>7</sup> The certificate

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<sup>2</sup>U.S. Const. art. IV, § 2; U.S. Const. amend. XIV, § 1.

<sup>3</sup>9 U.L.A. 87 (1936).

<sup>4</sup>Id. at 86.

<sup>5</sup>Fla. Stat. Ann. § 942.02 (1955).

<sup>6</sup>Ibid.

<sup>7</sup>The certificate of the Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, was filed in the Circuit Court of Dade County, Florida, on April 23, 1956. The certificate recited that Judge Schweitzer had read an affidavit of an Assistant District Attorney of the County of New York recommending that O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance at a grand jury investigation. 100 So. 2d at 151.

requested Florida authorities to require one Joseph C. O'Neill to attend and testify in a grand jury proceeding in New York County. The judge's certificate stated that O'Neill was a material witness in the New York proceeding and recommended that he be taken into custody and delivered to an officer of the State of New York to assure his attendance before the grand jury. O'Neill was not a resident of Florida but was temporarily within the state for the purpose of presiding at a union convention.<sup>8</sup> He was apprehended by the Florida authorities, gave bond,<sup>9</sup> and a month later he filed a response. The circuit judge, at the hearing to determine the materiality of the witness, based his opinion upon the record of the case and held the uniform act unconstitutional.<sup>10</sup>

The decision of the circuit court in the *O'Neill* case was appealed<sup>11</sup> by the State of New York. Upon review, the Florida Supreme Court outlined the manner in which the uniform act would have been applied to O'Neill if the circuit court judge had found it desirable to send him to New York under custody. O'Neill, a citizen of Illinois which had passed no reciprocal witness statute, was in Florida for only a brief visit. He was brought into court and confronted with an order placing him in custody of an officer who was to have conducted him to New York. His privilege of staying or returning to his home in Illinois, or of going elsewhere, would have been terminated. This, in the language of the Florida court, was a harsh "infringement of the right a citizen has to go from place to place which is a privilege . . . secured to him under the Fourteenth Amendment."<sup>12</sup>

The uniform act has been judicially attacked on constitutional

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<sup>8</sup>The New York grand jury was investigating the use of funds in the Distillery, Rectifying, Wine and Allied Workers International Union of America of which O'Neill was General President, Chairman of the Executive Board, and Chairman of the Social Security Department. There is little doubt that O'Neill was a material and necessary witness in an investigation into the misuse of the funds of this union.

<sup>9</sup>It was noted by the court in the *O'Neill* case that there was no provision made for bail in the uniform act. Fla. Stat. Ann. § 942.02 (1955).

<sup>10</sup>The circuit judge said the statute was unconstitutional because it gave extra-territorial jurisdiction to the state, impaired the right of ingress and egress, and made no provision for bail. The judge also thought that O'Neill was not a material and necessary witness.

<sup>11</sup>The court held that the proceeding was not criminal and that appeal was the proper method of review as, Fla. Const. art. V, § 5, the Florida Supreme Court had appellate jurisdiction in all cases at law originating in circuit courts. 100 So. 2d at 152.

<sup>12</sup>Id. at 155.

grounds in other states,<sup>13</sup> but Florida is the only state in which the statute has been declared wholly unconstitutional by a state court of last resort.<sup>14</sup> A situation now exists in which the majority of decisions support the statute, but the most recent decision denounces it.

The court's contention, that O'Neill's right of free ingress and egress among the states had been impaired, was based upon an unusual interpretation of the privileges and immunities clause of the federal constitution.<sup>15</sup> The traditional interpretation of this clause is that the states are enjoined only from discriminating between a citizen of the United States and a citizen of a particular state.<sup>16</sup> When an individual is within the boundaries of a state, he is amenable to the laws of that state;<sup>17</sup> therefore, if a state can curtail the right of its own citizens to ingress and egress, it can curtail the same right of any person who is within its boundaries.

The Florida interpretation of the privileges and immunities clause seems to be that the citizens of each state, no matter in which state they may find themselves, are to be afforded all the privileges and immunities granted by every other state. "Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each state are vouchsafed the privileges and immunities of the citizens of all the states." Therefore, "O'Neill is entitled . . . to all the privileges and immunities of all the citizens of all the other states . . ."<sup>18</sup> Expressed another way, the Florida court adopted the theory that a citizen takes with him when he goes into another state all of the privileges and immunities granted to him by his native state. Therefore, the court stressed the fact that O'Neill was a citizen of a state which had not passed a reciprocal witness statute and argued that his immunity from com-

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<sup>13</sup>*Blair v. United States*, 250 U.S. 273 (1919); *State v. Fouquette*, 67 Nev. 505, 221 P.2d 404 (1950); *In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842, cert. denied, 348 U.S. 874 (1954); *In re Cooper*, 127 N. J. L. 312, 22 A.2d 532 (1941); *New York v. Parker*, 16 N.J. Misc. 319, 1 A.2d 54 (1936); *In re Costello*, 279 App. Div. 908, 111 N.Y.S.2d 313 (1st Dep't 1952); *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911); *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953). Some of these cases arose under state statutes prior to the enactment of the uniform act.

<sup>14</sup>*In New York v. Parker*, 16 N.J. Misc. 319, 1 A.2d 54 (1936), the statute was held inoperative because the objective was not expressed in the title.

<sup>15</sup>See note 18 *infra* and accompanying text.

<sup>16</sup>*Madden v. Kentucky*, 309 U.S. 83 (1940); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Blake v. McClung*, 172 U.S. 239 (1898); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

<sup>17</sup>*Douglas v. New York, New Haven and Hartford R.R.*, 279 U.S. 377 (1929); *Blake v. McClung*, 172 U.S. 239 (1898); *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911).

<sup>18</sup>100 So. 2d at 154.



pulsory attendance at an out-of-state proceeding was brought with him into Florida.<sup>19</sup> In other words, O'Neill was *especially privileged*. Extending this view of the privileges and immunities clause, if Illinois had not passed an act providing for the subpoenaing of witnesses to attend trial within Illinois, then Florida would have been powerless to compel O'Neill to attend a trial within Florida. If Florida's courts really adopted this view of the privileges and immunities clause, they would be discriminating against their own state citizens in favor of out-of-state visitors. It must be remembered that the enjoyment of this privilege of ingress and egress is coincident with the duty of a citizen to aid his government by giving evidence in court.<sup>20</sup> Every citizen who attends any trial as a witness or a jurymen is deprived, in the same sense as he is deprived under the uniform act, of the privilege of leaving the state. The contention of the Florida court seems to be without merit.

Closely related to the privileges and immunities issue is the question of whether the uniform act may be so applied as to deprive a person of his liberty without due process of law. In the case of *In re Cooper*,<sup>21</sup> it was held that the uniform act was not unconstitutional as depriving an individual of his liberty without due process of law. In that case the court said the witness was guaranteed due process because prerequisite to the issuing of a summons was the requirement that a hearing be held to determine the witness' materiality and to insure no undue hardship. In *Massachusetts v. Klaus*,<sup>22</sup> the court said that the statute is no more in violation of the due process clause for depriving a proposed witness of his liberty without due process than is a statute providing for having a witness subpoenaed to attend a trial within the state; this law has never been questioned as being unconstitutional.<sup>23</sup> In both of these cases the courts emphasized that a hearing was guaranteed a witness before a subpoena could be issued and pointed out that this provision of the uniform act really gave the witness a better guarantee of due process of law than did the statutes providing that a witness be subpoenaed to attend a trial within the subpoenaing state. Other courts have recognized that

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<sup>19</sup>The language of the court was as follows: "If . . . a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable,' it cannot be true that the right of all the citizens of all the states to move among them has not been impaired." *Id.* at 156.

<sup>20</sup>*Blair v. United States*, 250 U.S. 273 (1919); 85 U. Pa. L. Rev. 717, 721 (1937).

<sup>21</sup>127 N.J.L. 312, 22 A.2d 532 (1941).

<sup>22</sup>145 App. Div. 798, 130 N.Y. Supp. 713 (1st Dep't 1911).

<sup>23</sup>130 N.Y. Supp. at 716.

the purpose of the statute is to aid, by means of comity between states, the orderly and effectual administration of justice and the prosecution of criminal conduct;<sup>24</sup> and implicit in their decisions is the principle that due process of law is an historical product and is not to be turned into a destructive dogma against the states in the administration of justice.<sup>25</sup>

The duty of a citizen to give evidence in court and the power of a state to compel evidence, subject to the right against self-incrimination, is a well-established proposition.<sup>26</sup> That this duty is not limited by state boundaries is manifested by the many acts of state legislation requiring persons to give evidence in the form of depositions for use in the courts of other states.<sup>27</sup> Such depositions suffice for civil suits, but in criminal prosecutions by any state which bases its jurisprudence on the common law, the defendant is entitled to be confronted with the witnesses against him.<sup>28</sup> Unless there is power somewhere to compel a witness to proceed from one state to another to testify, many guilty persons may escape punishment for their crimes. It is manifest that if this power of compulsion exists anywhere, it must exist in the state within which the witness is present and wherein he can be served with the necessary order or subpoena.

The Florida Supreme Court took a negative approach to the problem of whether a state legislature can constitutionally grant the power to state courts to require a person within the state to go into another state and testify. This approach struck at the fundamental idea and purpose of reciprocal legislation—i.e., what a state cannot accomplish acting alone it can accomplish acting in concert with other states. In invalidating so important an act of legislation, a court should base its decision firmly on constitutional law. In the *O'Neill* case

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<sup>24</sup>In *re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842 (1954); *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953).

<sup>25</sup>See *Rochin v. California*, 342 U.S. 165, 168 (1952) (dictum). See generally *Irvine v. California*, 347 U.S. 128 (1954).

<sup>26</sup>*Blackmer v. United States*, 284 U.S. 421 (1932); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Blair v. United States*, 250 U.S. 273 (1919).

<sup>27</sup>In considering virtually the same problem as that presented by the principal case, the court in *Massachusetts v. Klaus*, 145 App. Div. 798, 130 N.Y. Supp. 713, 715 (1st Dep't 1911), made the following observations in reference to the alleged unlawful extraterritorial effect of the statute: "Nor is the duty to give evidence, or the power to compel it to be given limited to causes pending in the courts of the state. Witness our statute under which persons within this state are required to give evidence in the form of depositions for use in other states." See generally 23 Ill. L. Rev. 195, 198 (1928).

<sup>28</sup>*McCreight v. State*, 45 Ariz. 269, 42 P.2d 1102 (1935); *People v. Bromwich*, 200 N.Y. 385, 93 N.E. 933 (1911).

the Florida court did not point out any specific provision of the federal constitution with which this objective of the uniform act was incompatible. Indeed, it would seem that there is no clause in the federal constitution that prohibits state legislatures from passing acts having extraterritorial effect. It seems to have been assumed by the Florida court such an act *would not* be passed because the state would have no means of enforcing it.<sup>29</sup>

It is well established that, except as limited by constitutional restrictions, the state acting through the legislature has absolute and unrestrained power over its own citizens and over those who may be within its boundaries.<sup>30</sup> Therefore, as long as a citizen is unable to point out a specific provision of the federal constitution which enjoins a state from requiring him to go into another state and testify, the power should constitutionally exist in a state to enact such a statute.<sup>31</sup>

THOMAS B. BRANCH, III

### RELIABILITY OF DECLARATIONS AGAINST PENAL INTEREST

A curious development concerning the hearsay rule has been the distinction drawn between declarations by persons against their pecuniary interests, and declarations that tend to show the commission of a crime by the declarant. Since the 1844 decision by the House of Lords in the *Sussex Peerage Case*,<sup>1</sup> the general rule has been that to qualify as a declaration against interest the statement must be adverse to the declarant's pecuniary or proprietary interests.<sup>2</sup>

In the recent South Carolina case of *McClain v. Anderson Free*

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<sup>29</sup>The court apparently made this assumption by asking the following question: "How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits?" In re O'Neill, 100 So. 2d 149, 155 (Fla. 1958).

<sup>30</sup>Modern Barber Colleges, Inc. v. California Employment Stabilization Comm'n, 31 Cal. 2d 720, 192 P.2d 916 (1948); Bohrer v. Toberman, 360 Mo. 244, 227 S.W.2d 719 (1950). See generally Ware v. Hylton, 1 U.S. (3 Dall.) 164 (1796).

<sup>31</sup>Mana Transp. Co. v. Shipman, 54 F.2d 313 (1931), cert. denied, 286 U.S. 543 (1932) Smith v. Brogan, 207 Ga. 642, 63 S.E.2d 647 (1951); 16 C.J.S. Constitutional Law § 96 (1956).

<sup>1</sup>11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (H.L. 1844).

<sup>2</sup>Id. at 113, 8 Eng. Rep. at 1045. In the *Sussex Peerage Case*, Lord Campbell stated: "I think it would lead to most inconvenient consequences, both to individuals and to the public, if we were to say that the apprehension of a criminal prosecution was an interest which ought to let in such declarations in evidence." See also Wigmore, Evidence § 1476 (3d ed. 1940).

*Press*,<sup>3</sup> evidence tending to show that the declarant had committed a criminal offense was excluded as hearsay. Plaintiff, a former sheriff, sued defendant for the publication of allegedly libelous statements in the latter's newspaper, which was claimed to have led readers to believe that plaintiff had accepted bribes, furnished protection, and granted immunity from arrest to a person engaged in an illegal liquor business. In trying to establish truth as a defense to plaintiff's claim of libel, defendant sought to introduce testimony of witnesses who had been told by declarant, deceased at the time of trial, that he was paying the plaintiff sums of money for protection from arrest. The evidence was admitted in the trial court and the jury returned a verdict for the defendant. Plaintiff moved for and was granted a new trial on the ground that the trial court had erred in admitting the hearsay testimony. On appeal, the ruling of the trial court that the testimony had been erroneously admitted was affirmed.

The majority of the Supreme Court of South Carolina was divided in its reasons for holding the declarant's testimony inadmissible. Judges Moss and Taylor reasoned that the testimony of the witnesses that the declarant had admitted offering protection money to the plaintiff was hearsay and as such was inadmissible. In reaching the same result, Judges Oxner and Stukes stated that, although declarations tending to expose the declarant to criminal prosecution are admissible in South Carolina, the circumstances surrounding declarant's statement rendered it inadmissible. Judge Legge, in a dissenting opinion, expressed the view that the trial court was correct in admitting the hearsay evidence in the first instance and that the trial court's decision for defendant should be affirmed.

The South Carolina court was faced with the question of whether declarations by a person exposing himself to criminal prosecution are admissible in evidence under the against-interest exception to the hearsay rule. An earlier case in South Carolina, *Coleman & Lipscomb v. Frazier*,<sup>4</sup> was directly on point. In the *Coleman* case a postmaster was sued for the negligent loss of a letter containing money. A storekeeper who had been allowed access to the mails admitted in the presence of defendant that he had stolen the money. The storekeeper was dead at the time of the trial. In this case, the court permitted the storekeeper's admission to go in evidence on two grounds: "1st, that the defendant was present, heard it, and received it as true; and 2d, that it was the admission of an act, committed by the party

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<sup>3</sup>232 S.C. 448, 102 S.E.2d 750 (1958).

<sup>4</sup>38 S.C.L. 146 (1850).

making it, against his interest, and subjecting him to infamy and heavy penal consequences, and who was dead at the trial. In either or both of these points of view . . . the evidence was admissible . . ."<sup>6</sup> This is a case in which the court had two independent grounds for admitting the declarant's hearsay statement. As to the first ground, the court had no difficulty finding that the 'silence of defendant in failing to deny declarant's statement amounted to an admission. In determining that the evidence was admissible on the second ground, the court referred to *Wright ex dem. Clymer v. Littler*<sup>6</sup> in which Lord Mansfield stated that a statement exposing the declarant to criminal liability was admissible. There is little doubt that in *Coleman* the court was recognizing declarations against penal interest as an exception to the hearsay rule.<sup>7</sup> In *Coleman*, the court apparently was not handicapped with knowledge of the *Sussex Peerage* decision, but if it was aware of the decision it was not followed.<sup>8</sup> *Coleman* has been recognized as the law of South Carolina ever since 1850.<sup>9</sup>

The opinion by Judge Moss in *McClain* gives two reasons for not adhering to the rule laid down in *Coleman*: (1) plaintiff, the party against whom the testimony was offered, was not in the presence of the declarant when the declarant said that he had paid plaintiff for immunity from arrest while the declarant continued to operate an

<sup>6</sup>*Id.* at 152.

<sup>7</sup>3 Burr. 1244, 97 Eng. Rep. 812 (K.B. 1761). Declarant, deceased at time of trial, confessed forging a will. The court held the confession admissible.

<sup>8</sup>38 S. C. L. at 152. The court in *Coleman* said: "[O]n the second ground . . . a declaration, made by the party who does the act, as in this case stealing the letter containing the money, is admissible . . . [W]hen it is remembered that this is not a matter of business . . . but was a criminal act, of which none could be so cognizant as the party, I think a reason will be found for its admission . . . The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both of these are apparent here. So here we have every guaranty of its trustfulness—the grave consequences of infamy, and, at least ten years' imprisonment, would certainly insure the truth of the speaker."

<sup>9</sup>The *Coleman* case came before the South Carolina court six years after the famous *Sussex Peerage Case* had been decided. There is no mention of that case in the court's opinion in *Coleman*, but it is submitted that the language in *Coleman* is such as to indicate that the doctrine of *Sussex* would not have been followed even though the Court had knowledge of *Sussex*.

<sup>9</sup>*Fonville v. Atlanta & C. Air Line Ry.*, 93 S.C. 287, 75 S.E. 172, 173 (1912). The court sought to distinguish this case from *Coleman* and decided to exclude a statement exposing the declarant to criminal prosecution. However, the court recognized *Coleman* as being the law and intimated that the decision would have been followed had the case been a proper one. Whaley, 1957 Handbook on South Carolina Evidence, 9 S.C.L.Q. No. 4A 1, 130 (1957). Judge Whaley says that a statement will qualify as a declaration against interest if the statement is "against either his pecuniary or his incriminatory interest."

illegal business;<sup>10</sup> and (2) the declarant's statement that he had paid plaintiff for protection not only incriminated himself but also served to incriminate plaintiff, who received the money.<sup>11</sup>

The first reason given by Judge Moss for excluding the declarant's hearsay more properly applies to a different exception to the hearsay rule, namely the exception dealing with admissions of parties. If a statement is made against a party in his presence and it is not denied by him, under circumstances in which a party would ordinarily deny it if untrue, then such a statement is admissible as evidence against that party.<sup>12</sup> In other words, if the declarant in the principal case had stated in the presence of plaintiff that he was paying plaintiff to furnish police protection, and plaintiff did not deny the statement, then the statement would be admissible as an adoptive admission. The exception involving admissions of parties by its very nature requires that the party against whom the evidence is offered be present at the time the extrajudicial statement was made.<sup>13</sup> However, there is no such requirement of a party's presence in order to qualify as a declaration against interest.<sup>14</sup>

The second reason given in the opinion rendered by Judge Moss for excluding the declarant's hearsay statement, namely, that it not only served to incriminate the declarant but also tended to incriminate plaintiff, is unconvincing when the rationale of admitting *any* hearsay is considered. The practice of admitting hearsay evidence was developed on the theory that some extrajudicial statements are surrounded by adequate safeguards that serve to insure their trustworthiness and are sufficiently reliable to be used as evidence, notwithstanding the absence of the customary safeguards of the courtroom at the time the statement was made. This reasoning would appear to support admitting the declarant's statement in the principal

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<sup>10</sup>102 S.E.2d at 757.

<sup>11</sup>Id. at 758.

<sup>12</sup>McCormick, Evidence § 247 (1954); 5 Wigmore, Evidence § 1071 (3d ed. 1940).

<sup>13</sup>Ibid.

<sup>14</sup>Smith v. Moore, 142 N.C. 277, 55 S.E. 275, 278 (1906). In this case, Judge Walker sets forth the requirements of a declaration against interest as follows: (1) that the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) and that he did not have any probable motive to falsify the fact declared. Since the date of this decision minor qualifications have been added to the four requirements, but it is to be noted that the basic requirements have remained. No authority has been found that supports the view that in order for the declaration to be admissible it be uttered in the presence of the party against whom the evidence is offered.

case even though it tends to incriminate plaintiff by raising a suspicion that he has been guilty of accepting money in return for protecting declarant's illegal activities. The statement's being against declarant's interest insures its reliability, the tendency to incriminate plaintiff not detracting from its reliability.<sup>15</sup> It should be admissible as a declaration against interest. The reasons given by Judge Moss indicate a reluctance to extend the *Coleman* case beyond its facts.<sup>16</sup>

Judge Oxner's concurring opinion agreed that the declarant's statement in the principal case was inadmissible but for entirely different reasons. The concurring judges recognized that the rule laid down in *Coleman* is the South Carolina rule on the subject of declarations tending to show the commission of crimes. They were unable, however, to find sufficient evidence of trustworthiness under the circumstances to allow the jury to determine the truth of declarant's statement. This conclusion was reached after considering the other testimony about the declarant's habits. This testimony tended to show that the declarant was a person prone to brag about his accomplishments, and his conduct indicated that he had no apprehension of being prosecuted.

The dissenting judge agreed with the concurring judges that *Coleman* represented the South Carolina law on admitting declarations against penal interest. However, he thought that the question of whether the declarant did or did not have a motive to falsify his statement that he had given bribes to plaintiff was a question for the jury and as such should have been left to that body for determination.<sup>17</sup>

The exclusionary rule as to declarations against penal interest was laid down in 1884 for the first time in the *Sussex Peerage Case*.<sup>18</sup> The

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<sup>15</sup>If it is determined that the declarant in the principal case had a motive to falsify the fact asserted, then the statement would be inadmissible. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 52 (1944), fully discusses such self-serving statements.

<sup>16</sup>The opinion by Judge Moss repeats several times that the majority of the American courts require that the declaration be against the pecuniary or proprietary interest of the declarant in order to be admissible under the against-interest exception, but does not cite a single case relied on by the court in *Coleman*.

<sup>17</sup>The distinction between Judge Oxner's concurring opinion and the dissenting opinion lies in a dispute on the court's function in ruling on preliminary questions of fact. The substance of this dispute lies outside the scope of this comment. For a complete discussion see Maguire and Epstein, *Preliminary Questions of Fact In Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 1 (1929).

<sup>18</sup>The facts of the *Sussex Peerage Case* reveal that an Act of Parliament forbade any descendant of George II from getting married without the previous consent of the king. One question to be determined was whether a valid marriage

decision was contrary to prior decisions at the time<sup>19</sup> and was also contrary to the historical development of the declaration-against-interest exception to the hearsay rule.<sup>20</sup> Nevertheless, the majority of American decisions have elected to follow the case,<sup>21</sup> and it was more than a half century before the rule received any serious judicial challenge.<sup>22</sup>

The rationale of admitting declarations against interest is based on an assumption that a person will not utter a statement adverse

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had been performed. Testimony of a witness who had heard a clergyman, now deceased, admit that he had performed the marriage was offered in evidence. The testimony was rejected even though the clergyman could have been prosecuted for violation of the Act.

<sup>19</sup>5 Wigmore, Evidence § 1476, n.8 (3d ed. 1940), cites three cases not considered by the court in the *Sussex Peerage Case* in which third persons' confessions of crime were admitted in evidence. In *Hulet's Trial*, 5 How. St. 1185, 1192 (1660), Hulet was charged with compassing and imagining the death of Charles I. Hulet tried to prove that Brandon did the deed. A witness testified that he heard Lord Capell ask the common-hangman, Brandon, "Did you cut off your master's head?" Brandon was heard to answer, "Yes." The testimony was admitted. In *Standen v. Standen*, Peake 32, 170 Eng. Rep. 73 (1791), the issue to be decided was whether or not a legal marriage had been performed. The marriage register showed the publication of banns three times, as was required. A witness testified that the clergyman told him that banns had been published only twice. The testimony was received. In *Powell v. Harper*, 5 C. & P. 590, 172 Eng. Rep. 1112 (1883), in an action in libel charging plaintiff with receiving goods known to be stolen, the declaration of the person who had stolen the goods was admitted in evidence.

<sup>20</sup>5 Wigmore, Evidence § 1476 (3d ed. 1940).

<sup>21</sup>*Donnelly v. United States*, 228 U.S. 243 (1913); *People v. Bailey*, 66 Cal. App. 1, 225 Pac. 752 (1924); *State v. Mosca*, 90 Conn. 381, 97 Atl. 340 (1916); *Miller v. State*, 165 Ind. 566, 76 N.E. 245 (1905); *Baehr v. State*, 136 Md. 128, 110 Atl. 103 (1920); *Commonwealth v. Sacco*, 259 Mass. 128, 156 N.E. 57 (1927); *State v. English*, 201 N.C. 295, 159 S.E. 318 (1931).

<sup>22</sup>*Donnelly v. United States*, 228 U.S. 243, 277 (1913). Mr. Justice Holmes made a frontal attack on the majority rule, saying: "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick.—The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length." Justices Lurton and Hughes concurred with Justice Holmes.



to his own interest unless the statement is true.<sup>23</sup> It is submitted that declarations made by the declarant exposing himself to criminal liability qualify under this rationale as readily as do statements which expose the declarant to liability for a sum of money.

The treatment given to statements against penal interest by the courts varies widely. A great many courts fail to analyze these statements in terms of the rationale applied to declarations against pecuniary interest. These courts find the disposition of the statement an easy task either by referring to it as simply hearsay<sup>24</sup> or by stating that to admit the testimony would create a danger of receiving perjured evidence.<sup>25</sup> The objection to perjured evidence, however, is not peculiar to statements against penal interest.<sup>26</sup> On the other hand, a number of courts have considered statements exposing the declarant to criminal liability in the light of the rationale applied to declarations against pecuniary interest, and have concluded that such statements do not qualify as "against interest." However, as one highly respected authority has stated, the realization of the consequence of imprisonment stemming from a statement against penal interest is an even more powerful influence upon conduct than the mere realization of legal responsibility for a sum of money.<sup>27</sup> In cases involving statements subjecting the declarant to both civil and criminal liability, the fact that the statement is also against penal interest does not render it inadmissible.<sup>28</sup> Instead, it has been said there is "all the more reason for admitting the statement."<sup>29</sup>

A minority of courts have adopted the more rational view that declarations against penal interest are just as reliable as statements against pecuniary interest and are admissible under the against-

<sup>23</sup>5 Wigmore, Evidence § 1457 (3d ed. 1940).

<sup>24</sup>Wells v. State, 21 Ala. App. 217, 107 So. 31 (1920); People v. Luce, 135 Cal. App. 1, 26 P.2d 501 (1933); State v. Mosca, 90 Conn. 381, 97 Atl. 340 (1916); Commonwealth v. Sacco, 259 Mass. 128, 156 N.E. 57 (1927).

<sup>25</sup>Baehr v. State, 136 Md. 128, 110 Atl. 103 (1920); Brown v. State, 99 Miss. 719, 55 So. 961 (1911); Davis v. State, 80 Okla. Crim. 515, 128 Pac. 1097 (1913).

<sup>26</sup>5 Wigmore, Evidence § 1477 (3d ed. 1940). "This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies." Dean Wigmore goes further and states in summation: "[A]ny rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent."

<sup>27</sup>Morgan, Declarations Against Interest, 5 Vand. L. Rev. 451 475 (1952).

<sup>28</sup>Citizen Nat. Bank v. Santa Rita Hotel Co., 22 F.2d 524 (9th Cir. 1927); Schaffner v. Equitable Life Assur. Soc., 290 Ill. App. 174, 8 N.E.2d 212 (1937); Weber v. Chicago, R.I. & P. Ry., 175 Iowa 358, 151 N.W. 852 (1915).

<sup>29</sup>County of Mahaska v. Ingalls, 16 Iowa 81 (1864).

interest exception.<sup>30</sup> The Model Code of Evidence has also adopted the view admitting declarations against penal interest.<sup>31</sup>

In conclusion, it is submitted that the opinion by Judge Moss in the principal case excluding the declarant's statement on the grounds of hearsay is in direct conflict with *Coleman*, and will not prevail in future cases before the South Carolina court. This can be stated with some certainty since a majority of the court, the three judges that delivered the concurring and dissenting opinions, were in full accord that *Coleman* was declarative of the South Carolina law on the subject. The two opinions reached opposite results on the question of admitting the hearsay testimony because they took different views of the application of the *Coleman* rule to the facts of the case. The South Carolina rule is in accord with the view which admits any declaration against interest, whether the statement be against the declarant's pecuniary or penal interests.

PAUL R. ROBERTSON

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<sup>30</sup>*Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926); *Thomas v. State*, 186 Md. 447, 47 A.2d 43 (1946); *State v. Voges*, 197 Minn. 85, 266 N.W. 265 (1936); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950). Texas has limited the admissibility of declarations against penal interest to those cases in which the state is relying wholly on circumstantial evidence, and the motive and opportunity for the declarant to commit the crime are present. *Ballew v. State*, 139 Tex. Crim. 636, 141 S.W.2d 654 (1940); *Proctor v. State*, 114 Tex. Crim. 383, 25 S.W.2d 350 (1930).

<sup>31</sup>Rule 509(1) is in harmony with the more reasoned authority which states that a statement is against interest "if the judge finds that the facts asserted in the declaration . . . so far subjected him [declarant] to civil or criminal liability . . . or created such a risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the declaration unless he believed it to be true."

## STATUTORY COMMENT

### VIRGINIA TAKES NEW APPROACH TO THE UNINSURED MOTORIST

The Virginia General Assembly at its 1958 session came up with a new plan for dealing with the uninsured motorist and his traffic victims.<sup>1</sup> Although the Virginia Advisory Legislative Council had recommended the adoption of the New Jersey Plan of an Unsatisfied Claim and Judgment Fund,<sup>2</sup> this recommendation was rejected in favor of a plan based on use of the uninsured Motorist Rider, which has given optional coverage under the ordinary liability policy.<sup>3</sup>

The first state to take any action whatsoever was Massachusetts, which adopted a compulsory liability plan in 1925.<sup>4</sup> Similar legislation became effective in New York in 1957<sup>5</sup> and in North Carolina in 1958.<sup>6</sup> This type of plan eliminates the problem of the resident uninsured motorist, but not that of the nonresident uninsured driver. Non-residents could be reached only with costly and unpopular points of entry check stations. A second objection to compulsory liability insurance is that it gives no protection to the victim of a hit and run driver.

Another approach was developed in New Jersey which utilizes an Unsatisfied Claim and Judgment Fund.<sup>7</sup> This plan provides coverage

<sup>1</sup>Va. Code Ann. § 38.1-381(b) (Supp. 1958). For a full understanding of the Virginia Plan, the following Code sections must be considered and analyzed: 12-65; 12-66; 12-67; 38.1-381; 46.1-167.1; 46.1-167.2; 46.1-167.3; 46.1-167.4; 46.1-167.5; 46.1-167.6.

<sup>2</sup>The problem of the Irresponsible Motorist—A report of the Virginia Advisory Legislative Council to the Governor and The General Assembly of Virginia 1957. The New Jersey Plan is cited and discussed in the text at n. 7 *infra*.

<sup>3</sup>For example, see The Travellers Insurance and Indemnity Company's Standard Family Protection Coverage Endorsement 4093:

"I. Damages for Bodily Injury Caused by Uninsured Automobiles

"To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

<sup>4</sup>Mass. Gen. Laws ch. 90, § 1A (1954).

<sup>5</sup>N.Y. Vehicle and Traffic Law § 93 through 93-K.

<sup>6</sup>N.C. Gen. Stat. §§ 20-309 through 20-319 (Supp. 1957).

<sup>7</sup>N.J. Stat. Ann. §§ 39:6-61 through 39:6-91 (Supp. 1957).

in the two instances that compulsory liability insurance does not reach.<sup>8</sup> New Jersey assesses a special registration fee that is earmarked for the fund;<sup>9</sup> if the automobile is uninsured, the fee is higher.<sup>10</sup> Any deficiency in the fund is made up from assessments against the insurers doing business in New Jersey on the basis of their premium income from such business within the state.<sup>11</sup> Each year's fee is determined on the past year's experience and subject to maximum limitations.<sup>12</sup> The fund so created is held in trust to provide a source from which collision victims can collect on judgments which otherwise would not be satisfied.<sup>13</sup>

The Virginia Plan requires every policy of bodily injury or property damage liability insurance issued or delivered in the Commonwealth to contain a clause wherein the coverage under the policy is extended to protect the insured to the extent of legal damages suffered from a wrongdoer who is an uninsured motorist and not financially responsible.<sup>14</sup> This fund is subject to the control of the State Corporation Commission.<sup>15</sup> The Commission will authorize annual payments from the fund to the insurers doing business in Virginia in the proportion to their premium income from the new mandatory clause.<sup>16</sup> In this way it is hoped that uninsured motorists will be required to pay substantially all of the premium increase imposed on insured drivers due to the increased risks covered by the mandatory clause required by the statute.<sup>17</sup> A further purpose, expressly stated in the act, is to encourage motorists to secure liability insurance.

A peculiar situation will be created by application of the Virginia Plan. By the very nature of the Plan the insurer would seem to have an adverse interest to that of the insured whenever the latter is

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<sup>8</sup>Id. §§ 39:6-78 through 39:6-81.

<sup>9</sup>Id. § 39:6-63(a).

<sup>10</sup>Id. § 39:6-63(b).

<sup>11</sup>Id. § 39:6-63(c).

<sup>12</sup>Id. § 39:6-63(d).

<sup>13</sup>Id. § 39:6-88.

<sup>14</sup>Va. Code Ann. § 38.1-381(b) (Supp. 1958): "Nor shall any such policy or contract be so issued or delivered unless it contains an endorsement or provision undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46-455, as amended from time to time, of the Code herein. Such endorsement or provisions shall also provide for no less than five thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of such loss or damage." See also n. 1 *supra*.

<sup>15</sup>Id. § 12-65.

<sup>16</sup>Id. § 12-66.

<sup>17</sup>*Ibid.*

damaged by an uninsured motorist.<sup>18</sup> Although the insurer is subrogated to the rights of the insured against the uninsured motorist to the extent the insurer has paid the insured,<sup>19</sup> this will not eliminate the conflict of interest between the insurer and the insured since these subrogation rights will in most cases prove worthless under the Virginia Plan. This is true because the insurer seems to be liable to the insured under the new clause only when the uninsured motorist has been proved to be financially irresponsible. Thus, when an uninsured driver, who is financially irresponsible, is involved in a collision with an insured motorist, the insurer of the latter would be interested in a finding of no liability in favor of the uninsured driver, thereby relieving itself of its obligation to the insured motorist under the mandatory clause of the policy.

Other problems may also present themselves. The statute expressly states that the insured, in order to bring himself within the mandatory clause and establish the liability of his insurer, may not be required to do more than to establish the legal liability of the uninsured motorist,<sup>20</sup> and further provides that the right of the insured party to the collision to employ his own counsel and pursue whatever legal remedies he may have cannot be restricted by the insurance contract itself;<sup>21</sup> therefore, a question arises as to the extent to which the application of the standard cooperation and settlement clauses in such policies is limited by the Virginia statute. Another interesting problem will arise when an insured motorist is damaged by another driver who is also seemingly protected by insurance, but whose insurance carrier has disclaimed coverage under the policy. Under the Virginia statute, Driver, whose Carrier has disclaimed, would be classified as an uninsured driver for the purposes of the statute.<sup>22</sup> The position of Motorist's Insurer would seem to be anomalous. This Insurer would be benefited by a finding of no liability in favor of Driver. However, if Motorist is successful in obtaining a judgment establishing the legal liability of Driver, certainly Insurer would have an interest in Driver's subsequent action against Carrier to establish the legal liability of the latter under the policy in question. This is so because if Driver is successful in this second action against Carrier,

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<sup>18</sup>The definitions of the words "Insured," "Insured Motor Vehicle" and "Uninsured Motor Vehicle" are set out in Va. Code Ann. §§ 46.1-167.3 and 38.1-381 (g) (Supp. 1958).

<sup>19</sup>*Id.* § 38.1-381(f).

<sup>20</sup>*Id.* § 38.1-381(g).

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

then Insurer will not have to pay Motorist under the uninsured motorist clause of the policy. Thus, the action by Driver against Carrier also indirectly establishes the legal liability of Insurer to Motorist. How much participation will be allowed to Insurer in this second action by Driver against Carrier remains to be seen. Nevertheless, it is certainly clear that both insurance companies, Insurer and Carrier, would benefit by a finding of no liability in favor of Driver in the original action brought by Motorist.

Similarly, when an insured motorist is damaged by any vehicle whose owner or operator is not known, The Virginia Plan provides that the insured's action be styled against "John Doe" and process be served on the damaged motorist's insurer as if the latter were a party defendant.<sup>23</sup> Thereafter, the insurer may defend the action and take whatever action the law would have permitted "John Doe." Moreover, the statute expressly states that a judgment against "John Doe," which is thereafter paid by the insurer, is not a bar to a second action by the insured against "John Doe," whenever his identity becomes known.<sup>24</sup> As the insurer is subrogated to the extent it has paid the insured following the original action, the first dollars recovered by the insured in the second action up to the amount he has been previously paid will belong to the insurer.<sup>25</sup> The statute does not appear to contemplate, at least in express language, that the insurer will have a similar right to sue the now known uninsured motorist. Has the statute cut off the subrogation rights of the insurer to the extent he has paid, or may he come into the second action by the insured as a party plaintiff? The last approach will probably be taken by the courts since the statute does not provide for subrogation and because independent suits against the wrongdoer by both insured and insurer would result in the splitting of a cause of action. Any other approach would make the right of subrogation given by the statute meaningless. The course of action suggested here would create an ethics problem, nevertheless, if the same attorneys who defended the first action against "John Doe" again represented the insurer in this second suit.<sup>26</sup> Similarly, the correlative rights of the three

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<sup>23</sup>Id. 38.1-381(e).

<sup>24</sup>Id. 38.1-381(f).

<sup>25</sup>Ibid.

<sup>26</sup>See the Canons of Professional Ethics:

"6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent

parties involved against each other, when patently negligent cases are made by the insurer on behalf of "John Doe" or by the insured in the second action against the now known wrongdoer, may well result in future litigation in order to establish what duties each owes to the other, if any.

It seems relatively safe to predict that much future litigation can be anticipated in order to set out precisely what this statute does and does not require or achieve.

Virginia also allows separate suits for property damages and personal injuries arising out of the same accident and does not condemn this to be the splitting of a cause of action.<sup>27</sup> But the majority of jurisdictions are contrary and this consideration would have to be recognized by other legislatures which might adopt a plan in accord with the one promulgated by the Virginia General Assembly.<sup>28</sup>

A more far-reaching plan than any of these actually adopted by the states has been advanced by Leon Green in his book, *Traffic Victims—Tort Law and Insurance*.<sup>29</sup> Professor Green in this book undertakes "to demonstrate the obsolescence and futility of common

of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"37. Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened." See also, 36 A.B.A.J. 733 (1950); Note, 13 U. Chi. L. Rev. 105 (1945); Note, 62 Harv. L. Rev. 104 (1948).

<sup>27</sup>Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 1935 (1949).

<sup>28</sup>See Note, 14 Wash. & Lee L. Rev. 114 at n. 8 (1957). See also, Note 15 Wash. & Lee L. Rev. 316 (1958).

<sup>29</sup>Concerned with the ever increasing traffic accident problem, this short monograph had its origin in two earlier lectures given by the author at the Cincinnati College of Law under the Robert S. Marx Foundation in 1956 and again in their final form at the Northwestern University School of Law under the Julius Rosenthal Foundation in 1958.

law jury trial and liability insurance as a remedy for traffic casualties, and advocates compulsory comprehensive loss insurance as a substitute."<sup>30</sup>

Although finding merit in jury trial and negligence law in what he terms the "simpler activities," Green feels that negligence law in the traffic aspect has become outdated due to the complexity of the factual situation involved in the cases.<sup>31</sup> He turns to Workmen's Compensation legislation to show an analogous need and result, and to establish his present proposal by a parity of reasoning.<sup>32</sup>

Basically, his solution, which admittedly did not originate with him, is compulsory loss insurance as distinguished from compulsory liability insurance.<sup>33</sup> He would provide such loss insurance as an incident of registering an automobile and would continue it for the vehicle's duration.<sup>34</sup> The state Insurance Commission would act in a supervisory capacity over administration, classification of the vehicles for rates, and all other relevant matters.<sup>35</sup> The commission would also have the dual responsibility of providing maximum protection to the public and offering the insurers a fair return.<sup>36</sup> The coverage under this plan would be complete—extending to the vehicle, its owner, operator, occupants and any other vehicles, persons or property injured or suffering damages from collision, fire, theft or any other risk incidental to the operation of a motor vehicle.<sup>37</sup> The ordinary rules of damages would be applicable with the exception that there would be no recovery allowable for pain and suffering.<sup>38</sup> All claims would be paid in full unless the amount of coverage proved insufficient, in which case the claims would be paid proportionately.<sup>39</sup> The truly significant part of the concept is that *the only issues involved would be whether the claimant suffered any injury due to the operation of a motor vehicle, the extent and amount of his damages, and possibly the identity of the vehicle itself.*<sup>40</sup>

Masters would be utilized in order to expedite the cases and to

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<sup>30</sup>Green, *Traffic Victims: Tort Law and Insurance* 5.

<sup>31</sup>*Id.* at 64, 80.

<sup>32</sup>*Id.* at 19, 60, 65, 80.

<sup>33</sup>*Id.* at 87-95.

<sup>34</sup>*Id.* at 87.

<sup>35</sup>*Id.* at 88.

<sup>36</sup>*Id.* at 88, 95.

<sup>37</sup>*Id.* at 88.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Ibid.*

<sup>40</sup>*Id.* at 89.



give them more thorough consideration.<sup>41</sup> These masters would not be bound by the ordinary rules of evidence and could call their own witnesses.<sup>42</sup> Moreover, they would have to approve all settlements made between the parties, and if necessary, modify any such agreement prior to submitting it to the court for approval.<sup>43</sup>

This much is certain—the several states are faced with finding some solution to the problems pointed out by Leon Green. His point is a valid one. With 70 million motor vehicles estimated to be operating in 1960, these problems can be expected to become even more acute.<sup>44</sup> While it is doubtful that few legislatures, if any, would take as extreme an approach as suggested by Green—insurance of the vehicle rather than the individual—it is less doubtful that each must take some approach if a remedy is to be found. The Virginia Plan has a practical advantage in that it uses the insurance companies to facilitate carrying it out, rather than assessing them so that the State itself operates the plan as in New Jersey. The Virginia approach is less likely to meet resistance and its adoption may thus be more feasible than other more far-reaching schemes. If it proves to be workable, when clarified by judicial decision, it may become more widespread in the future.

LEONARD C. GREENEBAUM

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<sup>41</sup>Id. at 97.

<sup>42</sup>Id. at 90.

<sup>43</sup>Id. at 91.

<sup>44</sup>Id. at 85.